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SUPERIOR COURT OF STATE OF ARIZONA  
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S  
MOTION FOR NEW TRIAL PURSUANT  
TO ARIZ. R. CRIM. P. 24.1**

Defendant James Arthur Ray, by and through undersigned counsel, hereby moves for a new trial based on prosecutorial misconduct. This motion is supported by the following Memorandum of Points and Authorities.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

The egregious prosecutorial misconduct throughout this litigation deprived Mr. Ray of his constitutional right to a fair trial. At every turn, the Yavapai County Attorney's Office exceeded the bounds of legal and ethical conduct, made knowing misstatements of law and fact, and recklessly violated the Constitution. Prosecutorial misconduct began before trial and continued through the final hour of the proceedings, with repeated violations of disclosure and *Brady* rules, tainting of the jury selection process, and improper closing arguments in both the guilt phase and aggravation phase. Arizona law requires that this Court consider the "cumulative effect" of all of the instances of misconduct on the fairness of Mr. Ray's trial. *State v. Hughes*, 193 Ariz. 72, 79 (Ariz. 1998). This Court must grant Mr. Ray's motion if the prosecutor's misconduct was "pronounced" and "persistent," and permeated the trial's atmosphere. *Id.* Those criteria are met—indeed, far exceeded—here. The cumulative effect of the lawless behavior of the Yavapai County Attorney's Office, from pre-trial discovery through the aggravation phase, infected Mr. Ray's case with a level of unfairness inimical to our constitutional system. A new trial is required.

### **II. SUMMARY OF ARGUMENT**

The extent of misconduct in this trial—its breadth, depth, and frequency—is staggering. One who witnessed Mr. Ray's five-month trial might quickly have forgotten that it is the prosecutor, not the criminal defendant, who carries the burden of proof, and who has a special obligation as a minister of justice to ensure the trial's fairness. *See, e.g.*, ER 3.8, cmt. (prosecutor has "special responsibilities" as "a minister of justice and not simply an advocate" and "specific obligations to see that the defendant is accorded procedural justice"); *Berger v. United States*, 295 U.S. 78, 87–88 (1935) (same). Such an observer might have become desensitized to a prosecutor's misstating the law or facts in order to gain or avoid admission of an exhibit; ignoring constitutional disclosure obligations and downplaying *Brady* violations as mere inconveniences; or making improper use of evidence in closing arguments. Yet these forms of misconduct *are* extraordinary in our system. *Any one* of the instances of prosecutorial misconduct in this trial

1 easily constitutes grounds for a mistrial under Arizona law. And the YCAO's misconduct was  
2 *not* confined. At a minimum, the prosecutor committed misconduct in at least the following ten  
3 categories:

- 4 1. Misconduct in pre-trial discovery, including the assertion of frivolous work  
5 product defenses—for which the Court ordered sanctions—and misstatements  
6 regarding the “secret meeting” with the medical examiners and others;
- 7 2. Meritless, bad-faith arguments in jury selection;
- 8 3. *Brady* violations;
- 9 4. Mid-trial investigation, encouraged violation of the rule of exclusion of witnesses,  
10 and failure to comply with mandatory disclosure rules regarding expert witnesses;
- 11 5. Frivolous legal arguments, including those regarding settlement agreements and  
12 the issue of legal duty;
- 13 6. A pattern of improper questioning of witnesses;
- 14 7. Recklessness toward the possibility of eliciting perjured testimony;
- 15 8. Numerous impermissible statements in guilt-phase closing argument;
- 16 9. Numerous impermissible statements in guilt-phase rebuttal closing argument;
- 17 10. Improper statements and improper use of evidence in aggravation-phase closing  
18 argument.

19 It bears repeating that misconduct in *any one of these categories* could be grounds for a  
20 new trial. *See, e.g., Pool v. Superior Court*, 139 Ariz. 98 (1984) (mistrial granted, and *retrial*  
21 *barred*, due to “numerous improper questions”—the worst of which was, “You’re pretty much a  
22 cool talker, aren’t you?”—that resulted “in at least two bench conferences and one court  
23 admonishment”). Misconduct spanning *all* of these categories rises to a different level. There is  
24 real doubt whether a criminal defendant in Yavapai County can have a fair trial given the pattern  
25 of aggressively unrepentant misconduct by the Yavapai County Attorney’s Office. At the least,  
26 the extreme misconduct in this case mandate a new trial and sanctions.

1     **III.     ARGUMENT**

2             **A.     The Undisclosed Meeting with Medical Examiners and the Bad-Faith**  
3                     **Assertion of Work Product Protection**

4             Prosecutorial misconduct in this case began long before trial. As this Court well knows,  
5     the County Attorney's Office hosted a meeting in December 2009 attended by law enforcement  
6     officers, medical examiners, and members of the YCAO, including the County Attorney herself.  
7     When the Defense learned of the meeting by conducting its own interviews with prosecution  
8     witnesses and requested disclosure, the prosecutor insisted, frivolously, that this meeting—  
9     including the fact of its occurrence, the names of those who attended, and information provided to  
10    the State's testifying expert medical witnesses—was somehow protected by work product  
11    privilege. At oral argument, the County Attorney argued the work product privilege in Arizona  
12    has no exceptions. This Court granted Mr. Ray's motion to compel and imposed sanctions  
13    against the State.

14            Developments at trial confirmed that, in addition to the prosecutor's bad-faith legal  
15    arguments, the YCAO made misstatements to the Court. The State's pretrial briefing had  
16    characterized the December 2009 meeting as purely a "charging decision" meeting, had urged the  
17    Court to reject the Defense's "fabrication of a 'controversy'" among the medical examiners, and  
18    had asked the Court to reject "the unsupportable allegation by Defense Attorneys that they do not  
19    have all the information relied upon by the medical examiners in reaching their conclusions."  
20    State's Response to Motion to Compel, filed 7/23/10, at 12–13. This "unsupportable allegation,"  
21    the State claimed, was "nothing more than a thinly disguised excuse to violate the State's work  
22    product privilege and to discover the State's legal theories." *See id.* In fact, the "fabrication" and  
23    "unsupportable allegation" were true. The evidence is that the medical examiners *did* disagree  
24    with each other regarding the cause of death, and that part of the meeting's purpose was to  
25    resolve that controversy. *See* Trial Transcript, 3/31/11, at 150:13–151:12 (testimony of Dr.  
26    Lyon).<sup>1</sup> Worse, the fact is that the State *was* withholding "information relied upon by the medical

27            <sup>1</sup> Trial transcripts, where available, are attached as exhibits to this motion in chronological order as  
28            Exhibits A-R. The March 31 transcript includes the following exchange:

1 examiners in reaching their conclusions,” and the State knew it. Worse still, that information—a  
2 slanted Powerpoint presentation compiled by Detective Diskin—contained material inaccuracies,  
3 including the false assertion that a prior sweat lodge participant, Daniel P., had had been  
4 diagnosed with heat stroke. *See generally* Trial Transcript, 3/31/11, at 207:1 *et seq.*(legal  
5 discussion regarding contents of Powerpoint). And all of this critical information the State tried  
6 to keep from the Defense through incomplete disclosure, assertion of a frivolous work product  
7 privilege, and shifting characterizations of the meeting’s nature and content. This conduct by the  
8 YCAO cannot be squared with the criminal defendant’s Due Process and fair-trial rights, or with  
9 the prosecutor’s ethical duties. *See* ER 3.8, cmt. (prosecutor has “special responsibilities” as “a  
10 minister of justice and not simply an advocate” and “specific obligations to see that the defendant  
11 is accorded procedural justice”); ER 8.4(c) (“It is professional misconduct for a lawyer to . . .  
12 engage in conduct involving dishonest, fraud, deceit or misrepresentation”).

13  
14  
15 Q [by Ms. Do]. And prior to going into that meeting with the county attorney and the detective, you knew  
16 that you had a difference of opinion with Dr. Mosley; correct?

17 A. Correct.

18 Q. And Dr. Mosley had a difference of opinion with you; correct?

19 A. Yes.

20 Q. And so this meeting, in part, was called for you all to have a dialogue?

21 A. Correct.

22 Q. To have a discussion about this?

23 A. Correct.

24 Q. Correct?

25 A. Correct.

26 Q. And because all of these deaths and illnesses occurred in connection to one incident,  
27 you were operating under the belief that the same cause affected all of them; correct?

28 A. Correct.

Q. So when you went to this meeting, you discussed, in the presence of the county attorney  
and the detectives, your difference of opinion; correct?

A. Correct.

Trial Transcript, 3/31/11, at 150:13-151:12 (testimony of Dr. Lyon).

1           **B.      Bad-faith Positions In Jury Selection**

2           Prosecutorial misconduct also marred the process of jury selection. The Court had  
3           acknowledged concerns regarding Mr. Ray's ability to receive a fair trial in Yavapai County  
4           given the nature and tenor of the media coverage and responses to juror questionnaires. Yet the  
5           State did not seek to facilitate the selection of a jury that would be fair and impartial to Mr. Ray,  
6           as the State's ethical duty requires. Instead, the State sought to strike *for cause* the one juror who  
7           understood that a defendant is presumed innocent. In addition, during *voir dire*, the Deputy  
8           County Attorney repeatedly asked prospective jurors whether Mr. Ray and the State would be  
9           starting on "an equal playing field" in the juror's mind, even though the Constitution requires that  
10          the parties in a criminal case *must not* start on an equal playing field.

11          The State also moved for reconsideration of the Court's ruling striking three jurors who  
12          informed the Court that their media exposure "*would*" interfere with their ability to be fair and  
13          impartial. *See generally* Defendant's Response to State's Motion to Reconsider, filed 2/9/11, at 1  
14          (quoting juror questionnaires and responses). The State wanted these individuals—including one  
15          who expressly stated, "I have already formed an opinion that Mr. Ray is guilty of *murder*," to  
16          serve on Mr. Ray's jury. Furthermore, in arguing its motion, the State took the frivolous  
17          position—reiterated several times during trial—that the State of Arizona has constitutional Due  
18          Process rights against a criminal defendant, or that the State can be the victim of structural error.  
19          These arguments nonchalantly seek to invert the constitutional bedrock rules of the criminal  
20          justice system.<sup>2</sup> The State should be sanctioned for making them in a court of law. *See* Ethical  
21          Rule (ER) 3.1 ("A lawyer shall not . . . assert or controvert an issue . . . unless there is a good  
22          faith basis in law and fact for doing so that is not frivolous."); ER 8.4(d) ("It is professional  
23          misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of  
24          justice.).

25  
26          <sup>2</sup> On the rare occasion that a State has tried to advance such an argument, the United States Supreme Court  
27          has made clear it is baseless. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966) ("Some of  
28          [South Carolina's] contentions may be dismissed at the outset. The word 'person' in the context of the Due  
        Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to  
        encompass the States of the Union, and to our knowledge this has never been done by any court.").

1           **C.     *Brady* Violations**

2           Throughout the course of trial, the State violated its constitutional obligations under *Brady*  
3 *v. Maryland*. With few exceptions, the State's disclosures in this regard occurred only when the  
4 Defense happened to learn of the existence of information, and only based on express (and often  
5 repeated) requests from the Defense. There is simply no telling what else the State did not  
6 disclose. No criminal defendant can have a fair trial given such a pattern of suppressed  
7 information and mid-trial surprises.

8                   **1.     The Haddow Report**

9           On April 13, 2011, this Court ruled that "the State has violated the affirmative duty under  
10 *Brady v. Maryland* and its progeny to 'disclose evidence that is both favorable to the defense and  
11 material to either guilt or punishment.'" Under Advisement Ruling on Motion for Mistrial,  
12 4/13/11, at 1. The ruling pertained to the State's failure to disclose—despite four express requests  
13 by the Defense—the report of environmental consultant Richard Haddow, which identified  
14 alternative causes of death and suggested that persons other than Mr. Ray might be culpable. As  
15 the Court noted, "the State not only failed to disclose the information, it misrepresented (whether  
16 inadvertently or not) that no such information existed." *Id.* at 2. And the Haddow Report, the  
17 Court ruled, was material for purposes of *Brady*, and "the late disclosure" of the Report "could  
18 prejudice the Defendant's ability fully to present a defense." *Id.*

19           The Court then issued a discovery order and granted a continuance to allow Mr. Ray to  
20 inquire into the issues related to the Haddow Report. The inquiry quickly revealed the State's  
21 reckless indifference to the truth. For example, as documented in the Defendant's Motion for  
22 Sanctions, filed April 20, 2011, the State's briefing and argument on the mistrial motion vastly  
23 understated the extent of its contacts with Mr. Haddow. The State's motion represented that there  
24 were only two contacts with Mr. Haddow: one when Haddow sent his preliminary report, and one  
25 when the prosecutors conducted a "brief interview" of him. Although at oral argument the State  
26 referenced a possible additional contact, the State's pleadings, filed with this Court, revealed no  
27 other communications. Yet Mr. Haddow's records revealed that the State's relationship with Mr.  
28 Haddow dated back to October 2009 and involved numerous telephone conversations and an

1 extensive in-person meeting. *See* Defendant's Motion for Sanctions, 4/20/11, at 3–6.<sup>3</sup> In  
2 addition, the prosecutors' own notes from their meeting with Mr. Haddow revealed that the State  
3 had suppressed *additional* exculpatory information. *See id.* at 7. The Defense argued then, as it  
4 does now, that the prosecutor's pattern of misconduct deprived Mr. Ray of a fair trial. *Id.* at 2, 9.

5 **2. Reckless Disregard of the *Brady* Obligation**

6 The State's suppression of the Haddow Report is not the only example of the State's  
7 disregard of its *Brady* obligation. On multiple occasions throughout this litigation, information  
8 surfaced that the prosecution should have, but did not, disclose pursuant to *Brady* and Ariz. R.  
9 Crim. P. 15.1(b)(8). A few examples from different phases of the case are illustrative.

10 First, prior to trial, the State informed the Defense that it would call purported cult expert  
11 Rick Ross and disclosed one of Mr. Ross's criminal convictions. The State did not, however,  
12 disclose Mr. Ross's violent "deprogramming" activities, which obviously constitute impeachment  
13 material and thus *Brady* material under Supreme Court precedent. Specifically, the State failed to  
14 inform the Defense that Mr. Ross had participated in the violent abduction of an adult in an effort  
15 to "cure" his religious beliefs—conduct for which a federal court upheld a \$2.5 million punitive  
16 damages verdict based on civil rights violations. When Mr. Ray learned of this information and  
17 requested disclosure from the State, the State tersely replied that "[t]he State has no information  
18 beyond what the defense attorneys learned in the interview" of Mr. Ross. Letter from Sheila Polk  
19 to Truc Do, 2/2/11.

20 Second, the State repeatedly disregarded its *Brady* obligations in connection with its  
21 untimely testing of the decedents' blood samples for organophosphates. The day before jury  
22 selection began (but well after the disclosure deadline had passed), the State informed the  
23 Defense that it had received laboratory test results for the blood samples of James Shore and  
24 Kirby Brown. The Defense then requested, *inter alia*, lab notes and communications, as well as  
25 an interview of the relevant lab employee. *See* Letter from Luis Li to Bill Hughes, 2/22/11.

26  
27 <sup>3</sup> The State's lack of candor is all the more unethical because the State's briefing on the mistrial motion  
28 accused the *Defense* of somehow violating its duty of candor to the Court by bringing the *Brady* violation  
to light.



1 Despite the State's *Brady* obligation and this specific request, the State failed or delayed critical  
2 disclosures:

- 3 • On February 25, a lab employee, Dr. Blum, spoke to Deputy County Attorney Bill  
4 Hughes and informed him that the test results were unreliable given the passage of  
5 time and means of storing the samples. *See* NMS Litigation Package, p.19  
6 (disclosed to the Defense in the State's 57<sup>th</sup> Supplemental Disclosure on 5/2/11;  
7 attached as Exhibit S).<sup>4</sup> The State did *not* disclose this critical information  
8 regarding the test's unreliability at that time. Instead, the State delayed until  
9 March 2, one day *after* the Defense gave its opening statement, to convey this  
10 information to the Defense in a hand-delivered letter from Mr. Hughes.
- 11 • In addition, the State failed to disclose that Dr. Mosley, a medical examiner and  
12 testifying expert witness, had written a letter to the State on March 4 opining that  
13 the lab tests would be a "waste of time and money," and had told Detective Diskin  
14 by telephone that testing for organophosphates after such a long delay was  
15 "foolish" and akin to a "shot in the dark." *See* Trial Transcript, 5/6/11, at 68:22–  
16 69:3, 72:12–18 (testimony of Dr. Mosley). This information was only disclosed to  
17 Mr. Ray after it surfaced during the April 18–19 Defense interview of Dr. Mosley  
18 and was specifically requested by the Defense.
- 19 • Furthermore, the prosecution wholly failed to disclose that the County Attorney  
20 had in April 2011 personally called Dawn Sy, the criminalist from the Department  
21 of Public Safety crime laboratory, and had learned exculpatory information from  
22 her. Ms. Polk had asked Ms. Sy specifically whether the GCMS test the lab ran  
23 for volatiles would detect pesticides or organophosphates, and Ms. Sy responded  
24 that the GCMS was non-specific and was only a volatile extraction. To know  
25 whether it could detect organophosphates, she would have to conduct further  
26

27 <sup>4</sup> On March 31, 2011, having *still* not received the requested lab notes, the Defense sent a second letter  
28 requesting them. On or around April 5, 2011, the State sent a fax to the lab requesting the notes. The  
"litigation packages" for Mr. Shore and Ms. Brown were not disclosed to Mr. Ray until May 2, 2011.

1 research and testing.<sup>5</sup> In other words, the absence of organophosphate findings in  
2 the test results from the DPS lab, without more, were *not* evidence that  
3 organophosphates were not present. After Ms. Polk's conversation from Ms. Sy,  
4 the YCAO told Ms. Sy that the prosecution was "trimming down" its case and  
5 would not need her.

6 Third, the State took a cavalier approach to the disclosure of impeachment evidence  
7 throughout trial. The State first objected, without legal basis, to the *Defense's* "failure" to  
8 disclose lawsuits that *prosecution witnesses* had filed against Mr. Ray or JRI where the Defense  
9 sought to rely on the lawsuits as a basis for impeaching witnesses. The State even went so far as  
10 to move to compel the *Defense* to disclose such lawsuits to the YCAO, claiming that "the State  
11 has no way of obtaining the requested documents without undue hardship." *See* State's Motion to  
12 Compel Disclosure of Civil Lawsuits, 3/24/11, at 5. But this classic impeachment material, as  
13 this Court held, was plainly *Brady* material, and was thus subject to mandatory disclosure *by the*  
14 *State, to the Defense*:

15 "The State should not assume that the Defendant has knowledge  
16 of a suit; if the State knows that a complaint has been filed (or is  
17 merely being contemplated) by a witness, it must inform the  
18 Defendant of that knowledge. The State must disclose any other  
*Brady* and Rule 15.1(b)(8) material or information that is within its  
knowledge or control."

19 Under Advisement Ruling on State's Motion to Compel Disclosure of Civil Lawsuits and  
20 Defendant's Motion to Compel Disclosure of *Brady* Material, filed 4/19/11; *see generally, e.g.,*  
21 *United States v. Bagley*, 473 U.S. 667, 676 (1985) (evidence that can be used to impeach  
22 government witness falls within *Brady*). The State had failed to comply with this obligation, and  
23 its senseless attempt to turn the tables and blame the Defense for its failures consumed needless  
24 briefing time and judicial resources.

25 Worse, in the course of arguing this matter, the State made false statements to the Court.  
26 The County Attorney first asserted to the Court that the YCAO had *not* known about the lawsuits,  
27

28 <sup>5</sup> *See* Draft Trial Transcript, 6/7/11, at 147-153.

1 and thus that they were not part of its disclosure obligation. *See* Trial Transcript, 3/22/11, at  
2 93:24-25 (Ms Polk: “The state’s Brady obligation is to provide to the opposing party all  
3 information that is in our possession or our control. These lawsuits are not in the state’s  
4 possession or control. We don’t know about them.”). Shortly thereafter, when questioned by the  
5 Court, the State reversed course and admitted it knew about the lawsuits, but claimed it gained  
6 such knowledge only from the defense counsel in interviews of the State’s witnesses.<sup>6</sup> This  
7 assertion, too, proved false. The record instead reflected that both the County Attorney herself  
8 and the Yavapai County Sheriffs Office had actual knowledge of the lawsuits, and direct contact  
9 with the plaintiffs’ civil attorneys, well before any defense interview of the States witnesses and  
10 independent of any information from the Defense. *See* Defendant’s Motion to Compel Disclosure  
11 of *Brady Material*, filed 3/25/11, at 2–6 (summarizing misstatements and providing transcript  
12 citations and excerpts).

13 As the Defense argued then and repeats now, the State’s disregard of its *Brady*  
14 obligations, and its repeated and baseless attempts to blame the Defense or rewrite the facts in an  
15 effort to avoid penalty, deprived Mr. Ray of Due Process and a fair trial. A criminal defendant  
16 cannot mount an adequate defense to a charged crime when the State fails to timely disclose  
17 critical information; surprises the Defense with the information at trial, when it may be too late to  
18 make meaningful use of it; and requires the Defense to divert attention from pressing matters to  
19 repeatedly litigate the prosecutor’s most basic obligations.

#### 20 **D. Failure To Comply With Mandatory Disclosure Deadlines**

21 In addition to its *Brady* violations, the YCAO repeatedly failed to comply with mandatory  
22 disclosure deadlines. Virtually every week of trial revealed new information the State had failed  
23 to disclose timely—that is, before trial. *See* Ariz. R. Crim. P. 15.6(c) (requiring completion of all  
24 disclosure at least seven days before trial). By conducting *during trial* the investigation it should

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25 <sup>6</sup> THE COURT: So you’re saying you did not know there were lawsuits filed. Because if you did  
26 know, then it was in your possession, it seems to me.

27 MS. POLK: Your Honor, the state is aware that lawsuits were filed. And mostly we learned about  
28 it through the defense interviews of witnesses when the defendant started asking witnesses about  
lawsuits and kind of probing, well, there is a confidentiality agreement, trying to get witnesses to talk  
about the terms. And so that’s how we learned that there were lawsuits. So that’s how we learned about it.  
Trial Transcript, 3/22/11, at 110:2-14.

1 have undertaken in the 18 months *prior* to trial, the State continuously exposed Mr. Ray to unfair  
2 surprise and deprived him of a meaningful ability to meet the State's allegations and present a  
3 defense.

4 Two examples are illustrative. First, on March 29, 2011, the State informed the Defense  
5 that, *eight days earlier*, it had interviewed two of the State's key witnesses, Michael and Amayra  
6 Hamilton. The State had not informed the Defense of the interview in advance and did not tape-  
7 record the interview. During the interview, the two witnesses apparently provided new  
8 information to the Detective regarding their supposed policy against using toxins or pesticides on  
9 their property—a policy the State later argued was critical to its proof beyond a reasonable doubt  
10 that a superseding force did not cause the deaths. The State could have, but did not, conduct this  
11 interview prior to trial, and thus have given Mr. Ray an opportunity to conduct his own follow-up  
12 investigation and prepare a Defense based on the Hamiltons' new statements. Adding to the  
13 harm, the State interviewed these two witnesses *together*, in violation of the rule of exclusion of  
14 witnesses. The State admonished the Court that the middle of trial was not the time for  
15 investigation, but did not impose a remedy. *See* Trial Transcript, 3/31/11, at 8:1–4 (“This is not  
16 the time to be investigating cases. I said months ago -- it was months ago that I said rules of  
17 disclosure are going to be followed and it's not going to be a trial by surprise.”); *id.* 17:4-12  
18 (“I've made some comments that apply there to the effect that this is really not the time for  
19 investigation. The rules do allow for late disclosure and unusual circumstances. They're there and  
20 they'll be applied if that comes up. But in general, this is not the time, six weeks in to trial, to be  
21 investigating matters that have been disclosed and talked about for over a year.”).

22 Second, in early April 2011, the State disclosed to the Defense an interview it had  
23 conducted with David Kent, a former sweat lodge participant. As the Court noted, Kent  
24 apparently would have offered opinions that were entirely inconsistent with, and would have  
25 “completely altere[ed],” the trial evidence. Under Advisement Ruling on Motion to Exclude  
26 Proposed Testimony of Late-Disclosed Expert David Kent, 5/20/11, at 2. The State offered  
27 virtually no explanation for what the Court found to be a “disturbing instance of extremely late  
28 disclosure.” *Id.* at 2. The State could have interviewed Kent before trial—indeed, before the

1 pretrial hearings on the very issue of prior sweat lodge ceremonies—but inexplicably failed to do  
2 so. Instead, the State argued in open court that there was *no* disclosure violation, and that the  
3 only fault lay with the Defense for not litigating the issue sooner. The State later sought to  
4 sidestep its disclosure violation by asserting, with no legal support at all, that late disclosure of  
5 witnesses is somehow an exception to the general disclosure rule and thus is exempt from the  
6 requirements of Rule 15.6. *See* State’s Response to Motion to Exclude Testimony of Dr. Kent,  
7 filed 5/3/11, at 6 (“Rule 15.6 applies to ‘material or information,’ not to noticing of a trial  
8 witness.”). The Court properly rejected this frivolous argument, holding that “if David Kent’s  
9 proposed testimony is intended to be a means of presenting ‘material and information’ not  
10 previously disclosed,” as it clearly was, “Rule 15.6(d) is clearly applicable,” and that the State’s  
11 “noncompliance with Rule 15.6 alone would require preclusion.” *Id.* at 1, 2. This Court correctly  
12 excluded Kent as a trial witness, based on the disclosure violation and the resultant unfairness to  
13 the defendant. *See id.* at 2–3. The YCAO’s misconduct in attempting to force in this witness and  
14 in needlessly litigating a baseless legal position must be considered in the Court’s evaluation of  
15 cumulative misconduct.

#### 16 **E. Frivolous Legal Arguments**

17 As noted above, the State throughout trial has taken positions that it knows to be legally  
18 meritless. This conduct violates the duty of a prosecutor to “seek justice, not merely a  
19 conviction,” and “to see that defendants receive a fair trial.” *Hughes*, 193 Ariz. at 80. Moreover,  
20 it violates the professional obligation of every lawyer to refrain from “assert[ing] or  
21 controvert[ing] an issue . . . unless there is a good faith basis in law and fact for doing so that is  
22 not frivolous.” Ariz. Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 3.1. Requiring a  
23 criminal defendant to mount a defense when the State repeatedly and knowingly misrepresents  
24 the law renders a trial unfair.

25 The State’s erroneous view of its *Brady* obligation well exemplifies the YCAO’s adoption  
26 of meritless legal positions to the defendant’s prejudice. Two additional examples to which the  
27 Defense objected during trial further illustrate the point. *See generally* Defendant’s Bench  
28 Memorandum Regarding Prosecutorial Misconduct, filed 4/5/11, at 10–12. The first is the State’s

1 position that it did not need to identify an independent legal duty in order to prosecute Mr. Ray  
2 for omissions, a dispute that has been briefed at length and with which the Court is familiar. *See*,  
3 *e.g., id.*<sup>7</sup> Second, the State twice took the position that settlement of a civil lawsuit is an  
4 admission of liability. *See* Trial Transcript, 3/9/11, at 269:3–5 (MS. POLK: Well, Your Honor, if  
5 the defendant, Mr. Ray, has settled a civil lawsuit, then that is an admission of some liability”);  
6 Trial Transcript, 3/22/11, at 95:18–23 (Ms. Polk: “[I]t’s the state’s position that if these lawsuits  
7 have been settled, if Mr. Ray or his insurance company have paid money to these witnesses, that  
8 information should be allowed as well because that to me is an admission of guilt by Mr. Ray if  
9 he’s settling these lawsuits.”). Apart from the fact that settlements are *not* admissions of liability  
10 and routinely state as much,<sup>8</sup> the State well knows that Arizona’s Rules of Evidence *forbid* use of  
11 settlement offers to prove liability. Ariz. R. Evid. 408(a) (evidence of settlements or settlement  
12 offers “is not admissible on behalf of any party, when offered to prove liability for, invalidity of,  
13 or amount of a claim that was disputed as to validity or amount”).

#### 14 F. A Pattern of Improper Questioning Of Witnesses

15 As detailed in the Defendant’s Bench Memorandum on Prosecutorial Misconduct, filed on  
16 April 5, 2011, the State asked myriad improper questions throughout the course of trial. The  
17 Defense incorporates each of those arguments here. These lines of improper questioning—  
18 argumentative and prejudicial questions, improper vouching, and references to facts not in

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19 <sup>7</sup> The following exchange occurred at trial:

20 THE COURT: My question, then, is are you saying with regard to Mr. Ray and what the state wants to  
21 prove, you don’t have to have a duty independent of what’s defined in the criminal statutes? Is that what  
22 you’re saying?

MR. HUGHES: That’s what I’m saying.

22 Trial Transcript, 3/17/11, at 21: 13-18.

23 <sup>8</sup> As noted in the earlier pleading, it is difficult to believe that any bar-admitted attorney could deny  
24 knowing that a settlement is not an admission of liability. “[I]t is a well established rule of law that  
25 ‘[w]hen a person against whom a claim is brought makes a settlement with the claimant, such person does  
26 not thereby acknowledge liability.’” *In re Dow Corning Corp.*, 250 B.R. 298, 341 (Bkrtcy. E.D. Mich.  
27 2000) (quoting *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir.1995)). This rule “is a simple  
28 recognition of the fact that a defendant may settle for any number of reasons which have nothing to do  
with actual tort liability.” *Id.* *See also, e.g., Tyler v. Corner Constr. Corp.*, 167 F.3d 1202, 1206 (8th  
Cir.1999) (stating that it is not uncommon for a defendant to settle a lawsuit which it considers frivolous in  
order to avoid the costs of litigation). And settlements routinely include explicit denials of liability. *See*,  
*e.g., Dowling v. Stapley*, 221 Ariz. 251, 275 (App. 2009) (“the approved settlement agreement expressly  
denied any admission of liability by any party to the agreement”).

1 evidence, among others—far exceed the type of conduct that Arizona courts have found to  
2 warrant mistrial. *See* Defendant’s Bench Memorandum Regarding Prosecutorial Misconduct,  
3 filed 4/5/11 (collecting cases); *see also, e.g., Pool*, 139 Ariz. at 103. The State asked this Court to  
4 admonish the prosecutor, for as the Arizona Supreme Court has recognized, a “strong, impartial  
5 trial judge,” armed with “both discretionary power and rules which he may use to control  
6 proceedings,” provides “[t]he best and most effective method” to constrain prosecutorial  
7 misconduct. *Pool*, 139 Ariz. at 103-104.

8 But the YCAO’s improper questioning continued unabated after the Defense’s Bench  
9 Memorandum was filed. Two glaring examples occurred during the testimony of Detective  
10 Diskin. First, in spite of the Court’s finding that the State’s suppression of the Haddow Report  
11 constituted a *Brady* violation, the County Attorney attempted to leverage the violation for the  
12 State’s benefit by explicitly asking Detective Diskin about potentially inculpatory aspects of the  
13 Haddow Report. *See* Trial Transcript, 5/4/11, at 187:16–25.<sup>9</sup> The Court noted the serious  
14 problem posed by this questioning. *See* Trial Transcript, 5/5/11, at 102:3–5 (“Ever since the late  
15 disclosure of the Haddow report, there has been a real issue, serious issue, in the case.”); *id.* at  
16 104:1–18 (“But I don’t know why the state brought up the Haddow report. . . . At this point the  
17 motion for mistrial is just, essentially, under advisement. . . . The state absolutely must avoid any  
18 further suggestion there is some report out there that sanctions some other inculpatory theory that  
19 hinges on CO2.”). A few days later, the Court granted Mr. Ray’s motion to preclude the State  
20 from calling Mr. Haddow as a trial witness, noting that “[u]nder the circumstances presented in  
21 this case, the State cannot withhold or fail to disclose information that is plainly subject to  
22 mandatory disclosure requirements under both constitutional principles and the rules of procedure  
23 and then selectively use related potentially inculpatory information to its benefit at trial.” Ruling

24 <sup>9</sup> Ms. Polk’s line of questioning included this exchange:

25 Q. Do you recall what you told Ms. Do during that interview on June 16th, 2010, about carbon  
dioxide?

26 A. Yes.

Q. And what did you tell her?

A. That I believed that the deaths were a result of a combination of heat and carbon dioxide.

27 **Q. Is that consistent with the information that you learned from the man named Rick Haddow?**

A. Yes.

28 Trial Transcript, 5/4/11, at 187:16–25.

1 on Pending Matters, 5/9/11, at 2. Yet that is precisely what the State had already done through its  
2 questioning of Detective Diskin.

3 The State also impermissibly shifted the burden of proof during the direct testimony of  
4 Detective Diskin. In a line of questioning that both the Court and Defense counsel noted they had  
5 never observed before, the County Attorney asked a litany of questions suggesting that the  
6 Defense had somehow acted improperly in not alerting the State to the possibility of poisoning or  
7 otherwise advising the State of the weaknesses in its case against Mr. Ray. These questions,  
8 which span eight pages of the trial transcript, inquired, *seriatim*, whether the Detective heard the  
9 individual Defense Attorneys ask government witnesses about organophosphates during various  
10 pre-trial interviews. See Trial Transcript, 4/28/11, at 183:20–190:2.<sup>10</sup> The Court noted its  
11 concerns with the implication of burden-shifting and, the next day, gave a two-paragraph  
12 cautionary instruction reminding the jury that the Defense has no burden or obligation to “provide  
13 the prosecutor or the court with a preview of his case or his arguments” or “to produce any  
14 evidence at all.”

15 **G. Recklessness Toward The Possibility Of Eliciting Perjured Testimony**

16 It is undisputed that the Government’s knowing use of material testimony that the  
17 Government knows or should know is false violates Due Process. *Napue v. Illinois*, 360 U.S.  
18 264, 269 (1959). In spite of that well-established rule, and the concomitant presumption that a  
19 *Napue* violation necessitates a mistrial, the State behaved recklessly with respect to the potential  
20 perjury by witness Mark Rock. The State’s apparent indifference to the possibility that Mr. Rock  
21 would perjure himself—and ultimately may have perjured himself—amounts to serious  
22 misconduct.

23  
24 <sup>10</sup> For example, Ms. Polk’s questioning included the following:

25 Q. And during that interview by Mr. Li, did he ever ask you whether you had found evidence of  
organophosphate poisoning?

26 A. No.

27 Q. Did he ever mention that word to you?

28 A. No.

Q. And during that interview, did Mr. Li ask you whether the victims had been exposed -- whether  
you had found evidence that victims had been exposed to other chemicals at the crime scene?

A. No.

Trial Transcript, 4/28/11, at 184:19–185:4.



1 As the Court will recall, the State represented that Mr. Rock would testify that he gave an  
2 incomplete statement to police in October 2009 because two Dream Team members had told him  
3 that the police were trying to frame Mr. Ray.<sup>11</sup> If this is a true characterization of Mr. Rock's  
4 conduct, he likely committed either the crime of false report to a police officer for his October  
5 statement or of perjury for his sworn testimony at the November 2010 hearing in this case, at  
6 which he testified that his October statement (which, in turn, was completely at odds with his  
7 May 2011 sworn testimony) was accurate. Despite these obvious problems, it was the *Defense*—  
8 in an effort to set aside the adversarial setting and fulfill an attorney's duty as an officer of the  
9 court—that had to move for the appointment of counsel to protect Mr. Rock's Fifth Amendment  
10 right. The State claimed to see no problem with Mr. Rock's continued testimony—a position that  
11 this Court rightly questioned. *See* Trial Transcript, 5/27/11, at 126:14–127:10 (THE COURT:  
12 “[I]n these situations it's necessary to look at the interest in Mr. Rock, Ms. Polk, at this point.  
13 And you're putting me in a very awkward position. County attorney. You've been in that position  
14 for over 11 years almost. And I believe strongly in the separation of powers, and I don't like to  
15 indicate what should be done. . . . But just from looking at it, as a judge, and hearing this and  
16 someone coming forward right now and saying, by the way, I didn't give the whole story back  
17 whenever . . . and this is why I didn't. If that's the gist of it, I just have a concern about that. And  
18 I'm almost stepping aside, really stepping aside from this case, just what happens when you have  
19 a witness in that position.”).

20 The State ultimately consented to the appointment of counsel for Mr. Rock, but appeared  
21 undeterred by the fact that Mr. Rock appeared poised to perjure himself. The State offered Mr.  
22 Rock use immunity for his continued testimony. The appointed Public Defender informed this  
23 Court, on the record, that he was advising Mr. Rock to “exercise his fifth amendment rights and  
24

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25 <sup>11</sup> At sidebar, Ms. Polk's made the following representation to the Court of Mr. Rock's anticipated  
26 testimony:

27 “Mr. Rock speaks to a couple of Dream Team members who have been interviewed by the police.  
28 And they tell him not to cooperate, that the police are trying to frame James Ray. And so when Mr. Rock  
gives his statement, he is not cooperative. And that's his explanation for not being cooperative. And some  
of the statements that the jury heard today, he did not provide that to the police at the time. He'll explain  
his healing process and when he did finally speak to the police.” Trial Transcript, 5/27/11, at 93:8–18.

1 refuse the use immunity the State is offering him,” because use immunity “does not encompass  
2 someone *who is determined to perjure themselves*.” Draft Transcript of Status Conference,  
3 5/31/11, at 4:10-13, 10:8-16 (emphasis added). Yet the County Attorney proceeded to elicit  
4 testimony from Mr. Rock that was flatly inconsistent with his prior sworn testimony. *See* Trial  
5 Transcript, 6/1/11, at 60:24–65:24 (legal discussion regarding potential perjury). The prosecution  
6 asked the Court to condone this practice on the ground that Mr. Rock had not lied, strictly  
7 speaking, but rather had recently recovered a host of repressed memories. If this is not the  
8 knowing elicitation of false testimony, it at least displays reckless indifference to the risk of doing  
9 so.

#### 10 **H. Numerous Improper Statements In Guilt-Phase Closing Argument**

11 Prior to the prosecution’s closing argument, the Defense filed a request for admonition  
12 identifying errors the County Attorney appeared likely to commit based on her prior positions.  
13 *See* Defendant’s Request for Admonition Regarding Closing Argument, filed 6/13/11.  
14 Notwithstanding this advance notice, the County Attorney committed the very misconduct set out  
15 in the brief, and more, in her guilt-phase closing argument. During a break in the argument, the  
16 Court noted on the record that there were grounds for the Defense’s objections and directed the  
17 prosecutor to acknowledge the wrongdoing. *See* Draft Trial Transcript, 6/15/11, at 184:23–25  
18 (THE COURT: “I think there are grounds for these and direct that you acknowledge them and  
19 you have.”). The damage, however, had already been inflicted, and *continued* in the rest of the  
20 prosecutor’s closing argument. The effect of these errors is severe.<sup>12</sup> The errors included the  
21 following:

- 22 • Burden-shifting. The State committed grave, persistent error by repeatedly making  
23 arguments that shifted the burden of proof to the defendant. The theme of the  
24 closing argument— “You have seen that the defense put the state in the position  
25

26 <sup>12</sup> As the U.S. Supreme Court has explained, “[i]t is fair to say that the average jury, in a greater or less  
27 degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be  
28 faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of  
personal knowledge are apt to carry much weight against the accused when they should properly carry  
none. *Berger*, 295 U.S. at 88.

essentially of trying to disprove a negative”—is itself impermissible. It is not the Defense that puts the prosecution in the position of having to prove that a superseding force did not cause the deaths; Arizona law puts the State in that position. *See, e.g., State v. Sucharew*, 205 Ariz. 16, 25–26 (App. 2003) (“[A] defendant has no obligation to establish the existence of a superseding cause. Instead, it is the State’s burden to prove all elements of the offense, beyond a reasonable doubt.”). The County Attorney elaborated on this theme at length, arguing that the Defendant’s arguments regarding superseding cause were “ridiculous,” “baloney,” a “house of cards,” and akin to “a takeout menu from an expensive diner.” The prosecutor argued, further, that the “position” the Defense put the State in was “convenient” to the Defense—that Mr. Ray and the Defense expert witness Dr. Paul “conveniently” cannot rule out organophosphate poisoning, that the Defense did not inform the State of its theory until shortly before trial, and that organophosphates “coincidentally” can only be tested right after the exposure. Draft Trial Transcript, 6/15/11, at 161–164. This line of argument improperly shifted the burden, and the Court gave a cautionary instruction as a result. And the error goes further as the State’s argument goes further; it turns upside-down the *Willits* rule and its Due Process origins. The fact that the State’s failure to preserve evidence deprived both sides of the ability to test the blood or sweat lodge materials for organophosphates is not convenient; it is an error that has impaired Mr. Ray’s Due Process rights.

- Vouching. Several times, the prosecutor improperly “vouched” and placed the government’s prestige behind the evidence. For example: “And here’s what *we know* about [Kirby Brown’s] frame of mind as she entered the sweat lodge. *We know that the defendant knew this too* because this is the statement that Kirby made on Thursday after she had come off of the Vision Quest during an open mic session.” Draft Trial Transcript, 6/15/11, at 151:4–9 (emphasis added). This conduct, repeated in rebuttal closing argument and during the aggravation phase, is

1 grounds for a mistrial. *See* Defendant's Request for Admonition Regarding  
2 Closing Argument, filed 6/13/11, at 6–7 (collecting cases).

- 3 • Misuse of evidence: The prosecutor's argument regarding the audio clip of Kirby  
4 Brown involved a second error. As this Court noted, the prosecutor explicitly  
5 asked the jury to use the exhibit for a purpose that this Court had previously ruled  
6 impermissible. *See* Draft Trial Transcript, 6/15/11, at 182:12–18 ("THE COURT:  
7 There's actually one other thing that I was concerned with. . . . I believe that the  
8 audio played from Kirby Brown was argued for a purpose that was not permitted,  
9 but that was contrary to the special instruction. And I noted that as well along with  
10 these others."). In fact, when the exhibit in question was admitted in March, the  
11 prosecutor had asserted that it was relevant to prove Ms. Brown's state of mind,  
12 and this Court had ruled that the clip was "absolutely inadmissible" for that  
13 purpose. *See* Draft Trial Transcript, 3/4/11, at 246:11–23.<sup>13</sup>
- 14 • Implying vicarious liability: The prosecutor suggested to the jury that Mr. Ray is  
15 responsible for every action at JRI (an argument the prosecutor greatly amplified,  
16 erroneously, in the aggravation-phase closing argument). For example, she argued  
17 that: "It seems that the defendant wants you to believe that this is merely a  
18 corporate event that he just shows up for. But we've produced for you the  
19 corporate filings to show you what. Who is the president of JRI, it's James Ray.  
20 Who is the secretary of JRI, it's James Ray. Who is the treasurers of JRI, it's  
21 James Ray. Who is the director of JRI, it's James Ray. And who signed this annual  
22 filing but the defendant." The obvious and improper inference from this argument  
23 is that by virtue of his officer positions, Mr. Ray "is JRI" and thus is responsible

24 <sup>13</sup> The pertinent exchange was as follows:

25 "THE COURT:[The audio clip] does not say anything about the state of mind of Kirby Brown though. It's  
26 *absolutely inadmissible* for that. The brief by the defense talks about that, *it is not admissible*  
27 *for that*. It's what notice it might put Mr. Ray on. This is the theory. I understand it. For knowing that  
28 people would follow directions like that or something."

MR. HUGHES: Your Honor we agree with that. If the court believes a limiting instruction is necessary,  
certainly the state wouldn't oppose it to explain to the jury it is being offered for that limiting purpose."  
Draft Trial Transcript, 3/4/11, at 246:11–23 (emphasis added).

1 for all corporate conduct. That is plainly not the law, as this Court recognized  
2 from the very first day of trial. *See* Trial Transcript, 3/1/11, at 39:4–6 (“THE  
3 COURT: . . . So I’m just saying I agree absolutely there can be no imputed  
4 criminal liability.”). This improper argument is tied to serious prejudice, for Ms.  
5 Polk argued that numerous *corporate* actions or omissions caused the decedents’  
6 deaths—for example, the failure to have an AED on site. Trial Transcript,  
7 6/16/11, at 55:16–19.

8 **I. Numerous Improper Statements In Guilt-Phase Rebuttal Closing Argument**

9 Even after the admonitions given regarding her closing argument, the prosecutor made  
10 numerous improper statements in her rebuttal closing argument. Those improprieties, spanning  
11 misstatements of fact, incorrect statements of law, violations of Rule 404 and this Court’s  
12 evidentiary rulings, improper vouching, improper appeals to jurors’ prejudice, and improper  
13 commentary on Mr. Ray’s decision not to testify, are set forth individually in the Defendant’s  
14 Motion for Mistrial, dated June 22, 2011, and incorporated by reference here. To take just one  
15 example, the County Attorney began to *testify*, before the Defense objected, regarding her office’s  
16 beliefs and motivations for refusing to disclose information regarding the December 2009  
17 meeting with the medical examiners. *See* Trial Transcript, 6/21/11, at 69:12-25 (Ms. Polk: “I  
18 want to talk about this meeting in December of 2009 at the county attorney’s office with the  
19 medical examiners. Mr. Li made several references to this so-called secret meeting. What you  
20 learned at trial is that there was a charging meeting at the county attorney’s office and that such  
21 meetings are not unusual as the prosecutors and the detectives review cases. ***Our belief that the***  
22 ***defense attorneys were not entitled to the details—***”). This statement and others made  
23 impermissible reference to facts not in evidence and constituted an impermissible attempt by the  
24 State to “place the prestige of the government behind [its] case.” *State v. Leon*, 190 Ariz. 159, 162  
25 (1997). Both forms of misconduct are grounds for mistrial.

1           **J.       Improper statements and improper use of evidence in aggravation-phase**  
2                       **closing argument**

3           During the aggravation-phase closing argument, the State made improper legal arguments  
4 regarding vicarious liability; made improper legal and factual arguments regarding Mr. Ray's  
5 alleged profit-motive and alleged (but non-existent) profits; and improperly used an audio clip  
6 that the State erroneously asserted was played in its opening statement, but in fact was never  
7 admitted into evidence at all.

- 8           • Vicarious liability: The State argued no fewer than five times that "Mr. Ray is  
9           JRI." That is a gross misstatement of corporate law, and disregards the clear-cut  
10          rule that Mr. Ray is *not* responsible for conduct by JRI. This argument echoed and  
11          amplified similar arguments the State improperly made throughout trial.
- 12          • Misstatements of fact: The State repeatedly, and incorrectly, stated that Mr. Ray  
13          "profited" from the sweat lodge ceremony or from his allegedly criminal conduct.  
14          As was pointed out at sidebar, there is absolutely no evidence of that assertion.  
15          This factual error compounded the underlying legal error, briefed in a separate  
16          motion, that the aggravating circumstance of pecuniary gain should never have  
17          been given to the jury in light of the unintentional nature of negligent homicide  
18          and the facts of the case.
- 19          • Improper use of evidence: The State played an audio clip in which Mr. Ray stated,  
20          *inter alia*, that participants had made an investment to participate in the retreat and  
21          might have wanted their own showers; the clip also made joking reference to  
22          participants' snoring roommates.<sup>14</sup> The Defense objected to this clip on the

23           <sup>14</sup> The Defense believes the clip included roughly the following passage:

24                       If you're really, truly set an unbending commitment, "I'm really going to  
25                       do whatever it takes, no matter how uncomfortable it is, no matter how  
26                       frightening" then you will have a breakthrough. You may feel as if you are  
27                       having a breakdown at some point in time and that's okay because sometimes the  
28                       walls must come down so that new walls may be built. But I promise you, you'll  
                      have a breakthrough. And that's what you really want, isn't it? I mean isn't that  
                      why you made the investment to be here, and you trudged off to the desert ... to  
                      sleep in a tent ... and share bathrooms. You know ... I mean ... for you ... you  
                      know, some of you are already having a breakdown. [Laughter]. "For the amount

1 ground that Defense counsel did not recall hearing the clip played a trial. The  
2 Court stated that it, too, did not recall hearing the clip. *See* Trial Transcript,  
3 6/29/11, at 14:14 (“THE COURT: I don’t recall hearing that.”). In response, the  
4 State asserted, and apparently continued to assert well after the aggravation  
5 hearing (indeed, until hours before the Defense’s new-trial motion is due), that the  
6 clip was played in the State’s opening statement. *See id.* at 14:15–18 (“MS.  
7 POLK: Your Honor, it was played in my opening. And then I moved to admit all  
8 those audios, and it was admitted at the beginning of trial.”). The State identified  
9 the Exhibit as 734, and verified that Exhibit 734 was admitted into evidence on  
10 March 2. In a subsequent filing with the Court, the State averred that every clip on  
11 Exhibit 734 was played in the County Attorney’s opening statement. But the  
12 Defense has reviewed the opening statement multiple times and has not found the  
13 disputed clip, or any portion of it. The time stamp the State provided for clip  
14 734\_31, which the State identified as containing the disputed statements, does not  
15 correspond to those statements. As of this morning, the prosecutor now confesses  
16 error: the clip was *never played at trial or admitted into evidence*. *See* State’s  
17 Notice of Error In Playing of Exhibit 744 At Aggravation Hearing, filed 7/11/11.  
18 It is the prosecutor’s responsibility to ensure that unadmitted evidence is not  
19 played for the jury, and to make accurate representations to the Court as to whether  
20 and when a disputed statement was admitted. As the Court noted, ***error in this***  
21 ***regard is grounds for a mistrial***. *See* Trial Transcript, 6/29/11, at 14:23–25.

22  
23  
24 of money I spent, you know, you’d think I’d have my own shower ... and my  
25 roommate snores.” [Laughter]. But at least he’s consciously aware of that.  
26 [Laughter]. Okay. So, so again, my objective, my intention for you is that ... and  
27 please understand, you’re not ever gonna —all of us can have a master  
28 experience, we can have a materialist experience, we have all these things within  
us, but where you spend 51% of your time is where you are in a particular stage.  
You can have ... you can have altered states ... states are temporary ... and you’ll  
have plenty of altered states experiences this week.

1 ("THE COURT: If it's admitted at trial, then it's admitted. *If it's not admitted,*  
2 *then it's right into a mistrial.*" (emphasis added)).

3 **IV. CONCLUSION**

4 This Court has expressly noted that the prosecutorial misconduct in this case colored the  
5 trial proceedings. On June 16, for example, in the context of the need to give a cautionary  
6 instruction due to the prosecutor's repeated burden-shifting, this Court noted: "And I think that  
7 the case has been framed with a *Brady* issue. I look at that and the other things that have occurred,  
8 the initial problem in getting information that was provided to the medical examiners. I think all  
9 of that tends to color how the case has proceeded." Trial Transcript, 6/16/11, at 30:19-24.

10 Under established law, when pervasive misconduct permeates the atmosphere of a trial as  
11 it did here, a defendant's claim of prosecutorial misconduct must prevail. *See, e.g., Hughes*, 193  
12 Ariz. at 79. In this case, many of the instances of the YCAO's misconduct were, on their own,  
13 grounds for mistrial with prejudice. Taken together, the myriad incidents of misconduct leave no  
14 question but that Mr. Ray's constitutional fair-trial right was violated. The State's persistent and  
15 pronounced misconduct demands a new trial. And the knowing and willful nature of the  
16 misconduct warrants sanctions and will bar re-prosecution.

17  
18 DATED: July 11, 2011

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BRAD D. BRIAN  
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TRUC T. DO  
MIRIAM L. SEIFTER

THOMAS K. KELLY

22  
23 By: 

Attorneys for Defendant James Arthur Ray

24  
25 Copy of the foregoing delivered this 11<sup>th</sup> day  
26 of July, 2011, to:

27 Sheila Polk  
28 Yavapai County Attorney



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Prescott, Arizona 86301

by M DeNco

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                       FOR THE COUNTY OF YAVAPAI

3  
4       STATE OF ARIZONA,       )  
5               Plaintiff,       )  
6               vs.               ) Case No. V1300CR201080049  
7       JAMES ARTHUR RAY,       )  
8               Defendant.       )  
9       \_\_\_\_\_ )

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14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15               BEFORE THE HONORABLE WARREN R. DARROW  
16                       TRIAL DAY SEVEN  
17                       MARCH 1, 2011  
18               Camp Verde, Arizona  
19               (Partial transcript.)  
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21  
22

23  
24                               REPORTED BY  
25                               MINA G. HUNT  
                              AZ CR NO. 50619  
                              CA CSR NO. 8335

1 remedy that is through cross-examination what they  
2 actually know.

3 And the other thing is I can only decide  
4 so much in a pretrial context too. So I'm just  
5 saying I agree absolutely there can be no imputed  
6 criminal liability. But the facts that go into how  
7 people were thinking in that sweat lodge, what they  
8 were experiencing -- that's relevant evidence and  
9 also in earlier parts of the seminar perhaps as  
10 well.

11:01.43AM

11 And if they were acting pursuant to  
12 instruction, then that wouldn't be just imputed.  
13 If someone is instructed to act a certain way, then  
14 that wouldn't be imputed either.

15 MR. LI: Your Honor, just on the issue of a  
16 pushing, this is a witness that the state is not  
17 going to call. So you're going to have --

18 THE COURT: Mina needs a break. Just getting  
19 a little --

11:02.11AM

20 MR. LI: I'll make this quick. Okay. So this  
21 witness is one of the Dream Teamers who the state  
22 has elected not to call. In her interview she says  
23 I did that on my own. Okay.

24 But the state is going to have a witness,  
25 probably Miss Mercer or somebody else, Miss Foster,

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1 404(b) does allow evidence, if it goes to prove for  
 2 example knowledge. That's exactly what we're  
 3 trying to prove is Mr. Ray's knowledge that this is  
 4 ^ Miss ^ Miss Brown's mental state and how she  
 5 approaches his programs. I'm told by Ms. Polk that  
 6 the excerpt that we're going to play starts about  
 7 nine lines down from the ex /#1ER79 in the motion  
 8 Starting around the words and when we started the  
 9 game I was like you. I was like I'm going to be  
 10 the hero and then goes on through the remainder of  
 11 that ex /SERPTD. Your Honor, that information from  
 12 that point on clearly is relevant to put Mr. Ray on  
 13 notice having heard that statement by ^ Miss ^ Miss  
 14 Brown that this is a person who would go into the  
 15 sweat lodge and would stay in there until the very  
 16 better end at least that's a reasonable inference  
 17 the jury can make from that evidence. With respect  
 18 to the argument that there is a 403 issue. Your  
 19 Honor 403 he shall /AOU pertains to things like  
 20 gruesome photographs in a murder case for example  
 21 that serve no legitimate purpose in the case. The  
 22 case law talks about /PREPL /TKEUS. It's evidence  
 23 that is so severe that it causes the jury to reach  
 24 an improper verdict for an improper motive such as  
 25 /HOR /ROR of what they've seen. There is nothing

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1 in here Your Honor like that. Like we see in the  
 2 cases that talk about undue prejudice. Remember  
 3 undue prejudice is a legal term. It's not -- it's  
 4 not obviously every evidence is /PREPL judicial. I  
 5 think the /KAES law explains that. If it wasn't  
 6 prejudicial it wouldn't be relevant it wouldn't be  
 7 offered. In this case Your Honor it does go to  
 8 Mr. Ray's state of mind it is relevant it is not  
 9 hearsay because it's for that reason. We would ask  
 10 that the court allow us to play that excerpt.  
 11 THE COURT It does not say anything about the  
 12 state of mind of Kirby Brown though. It's  
 13 absolutely inadmissible for that. The brief by  
 14 the defense talks about that, it is not admissible  
 15 for that. It's what notice it might put Mr. Ray  
 16 on. This is the theory I understand it. For  
 17 knowing that people would follow directions like  
 18 that or something.  
 19 MR. HUGHES Your Honor we agree with that.  
 20 If the court believes a limiting instruction is  
 21 necessary, certainly the state wouldn't oppose it  
 22 to explain to the jury it is being offered for that  
 23 limiting purpose.  
 24 THE COURT I /TWAOPBTS hear from Ms. Do. I  
 25 think 403 applies /AE other context of course than

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1 photographs. And that's a concern. And if this  
 2 comes in, as hearsay, but it becomes not hearsay  
 3 when it's not for the truth of the matter asserted  
 4 then the other party is automatically entitled to a  
 5 limiting instruction. That's how that works.  
 6 ^ Miss ^ Miss did.  
 7 MS. DO Your Honor, I think it's significance  
 8 to note that the state began with a theory that  
 9 this was /REL /STRAOPBT ^ Miss ^ Miss Brown's state  
 10 of mind. They began there and only abandoned that  
 11 after we raised our objection yesterday and  
 12 reminded the court that the court had already ruled  
 13 the excerpt inadmissible for that purpose. The  
 14 state found a new theory to try and fit this  
 15 evidence in. I think that should be considered by  
 16 this court as to the true purpose of why the state  
 17 wants this evidence in. I think that the probative  
 18 value as articulated by the state is so far  
 19 outweighed by the prejudice of playing the /SROES  
 20 of one of the did he is he /TKEPBTSD to the jury.  
 21 I understand the court's prior reasoning there are  
 22 some factors that may be relevant in assessing the  
 23 defendant's state of mind. But in this case it  
 24 seems like we're missing a very important step and  
 25 that is has the state even shown by evidence that

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1 Mr. Ray was aware of a substantial and unjustified  
 2 risk of death within the sweat lodge to /SWEGBT up  
 3 to the knowledge nexus. That Mr. Ray is  
 4 relevant -- I'm sorry Mr. Ray is aware of the fact  
 5 his parties /TPAPBTS want to play ^ full ^ if you  
 6 will on or they want to go into the activity with  
 7 100 percent commitment. The state's been able to  
 8 introduce that evidence in a very cumulative  
 9 fashion through almost every witness that's taken  
 10 the stand through the question of playing  
 11 ^ full ^ if you will on. Through the questioning  
 12 of you know, people's commitment. I think that the  
 13 court needs to weigh the 403 and look at what  
 14 probative value this particular hearsay evidence  
 15 this statement by the did he see dents is going to  
 16 have and weigh that against the prejudice to  
 17 Mr. Ray of having the voice of the decedent in this  
 18 case played. I'm sorry Mr. Hughes. If I may say  
 19 one more thing.  
 20 THE COURT Go ahead.  
 21 MS. DO I mean we're troubled by this for the  
 22 same reason why we are troubled by the fact that in  
 23 Ms. Polk's opening statement, noticed for a good  
 24 hour and a half through her various discussion of  
 25 the facts and the evidence in this case she had one

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                           FOR THE COUNTY OF YAVAPAI

3  
4       STATE OF ARIZONA,       )  
5               Plaintiff,       )  
6               vs.               ) Case No. V1300CR201080049  
7       JAMES ARTHUR RAY,       )  
8               Defendant.       )  
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14                       REPORTER'S TRANSCRIPT OF PROCEEDINGS

15                       BEFORE THE HONORABLE WARREN R. DARROW

16                               TRIAL DAY TWELVE

17                               MARCH 9, 2011

18                               Camp Verde, Arizona

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REPORTED BY  
MINA G. HUNT  
AZ CR NO. 50619  
CA CSR NO. 8335

1     what purpose would that serve for the state to do  
2     that?

3             MS. POLK: Well, Your Honor, if the defendant,  
4     Mr. Ray, has settled a civil lawsuit, then that is  
5     an admission of some liability.

6             We don't know -- we don't know what  
7     happened to the case because of the confidentiality  
8     agreement. The defendant knows. I don't know if  
9     the criminal defense attorneys know. But the state  
10    does not know.

11            Every witness who filed a complaint  
12    against the defendant, we know that it is settled.  
13    But every single witness has told us there is a  
14    confidentiality agreement. We have respected that  
15    and we have not asked about the terms.

16            MR. LI: Actually --

17            THE COURT: I don't think the release is going  
18    to say that there is an admission of liability.  
19    I've seen very few civil settlements that have that  
20    kind of a release.

21            MR. LI: I think they would pull my Bar card  
22    if I wrote a release that says -- you know -- we're  
23    liable and guilty. That's not what settlements  
24    typically are.

25            THE COURT: I have a concern with the defense

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
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3  
4       STATE OF ARIZONA,       )  
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14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15               BEFORE THE HONORABLE WARREN R. DARROW  
16                       TRIAL DAY SEVENTEEN  
17                       MARCH 172, 2011  
18                       Camp Verde, Arizona

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24                               REPORTED BY  
25                               MINA G. HUNT  
                              AZ CR NO. 50619  
                              CA CSR NO. 8335

1           MR. HUGHES: No. What I'm saying is the line  
2 of cases that discuss duty are discussed in  
3 connection with holding a corporation liable for an  
4 employee's acts or holding an employee liable for  
5 corporation's act. That's a different case.  
6 Notwithstanding the defendant's argument, that's a  
7 different case than we have here.

8           In this case we're attempting to hold  
9 Mr. Ray liable for his own acts, not for the acts  
10 of the corporation. There is certainly no  
11 prosecution against the JRI corporation to show  
12 that it's liable for Mr. Ray's acts.

13          THE COURT: My question, then, is are you  
14 saying with regard to Mr. Ray and what the state  
15 wants to prove, you don't have to have a duty  
16 independent of what's defined in the criminal  
17 statutes? Is that what you're saying?

18          MR. HUGHES: That's what I'm saying. And I do  
19 believe the Far West bears that analysis out. Far  
20 West talks about the fact that the state  
21 established a violation of the manslaughter statute  
22 and also that it established violations of the  
23 duty. And they're independent of each other.

24               Where the duty becomes important is when  
25 you're attempting to hold someone else, either the



1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
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3  
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14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15               BEFORE THE HONORABLE WARREN R. DARROW  
16                       TRIAL DAY NINETEEN  
17                       MARCH 22, 2011  
18                       Camp Verde, Arizona

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24                               REPORTED BY  
25                               MINA G. HUNT  
                              AZ CR NO. 50619  
                              CA CSR NO. 8335

1           Moreover -- you know -- just on the sort  
2 of disclosure issue, Your Honor, we had a long  
3 conversation about this several weeks ago. It is  
4 the state's obligation to find Brady. And the fact  
5 that a witness has a bias is Brady. And it is not  
6 the defense's obligation to find Brady. We do so  
7 because we're diligent.

8           But if I were the state and I were going  
9 to call a witness, I would want to know, hey. Have  
10 you filed -- particularly in a case like this, hey.  
11 Have you filed a lawsuit? What have you said in  
12 the lawsuit? Do you want money? These are all  
13 issues that go directly to the credibility of the  
14 witness and that are all -- those responsibilities  
15 about finding out those issues and disclosing them  
16 to the defense are all duties that fall squarely on  
17 the state.

18           THE COURT: Ms. Polk.

19           MS. POLK: Your Honor, yes. In response,  
20 first of all, it's not the state's obligation to go  
21 find Brady. The state's Brady obligation is to  
22 provide to the opposing party all information that  
23 is in our possession or our control.

24           These lawsuits are not in the state's  
25 possession or control. We don't know about them.

1 motive or bias.

2 Then there is additional issues. The  
3 complaint itself is hearsay, clearly hearsay. It's  
4 an out-of-court statement that the defense, at  
5 least with respect to Mr. Mehravar, intended to  
6 introduce because they wanted to try to prove to  
7 the jury that there is other issues such as toxins,  
8 there is other liability issues for Angel Valley,  
9 all sorts of issues that obviously are not settled  
10 by a lawsuit but are language that are used in that  
11 lawsuit.

12 The complaint is hearsay. To be reading  
13 the complaint in the language of the complaint to  
14 this witness is hearsay and should not be allowed.  
15 I agree that the fact of the lawsuit, and she has  
16 admitted it, goes to motive or bias, and then the  
17 inquiry stops there.

18 Although it's the state's position that  
19 if these lawsuits have been settled, if Mr. Ray or  
20 his insurance company have paid money to these  
21 witnesses, that information should be allowed as  
22 well because that to me is an admission of guilt by  
23 Mr. Ray if he's settling these lawsuits.

24 And I think Mr. Li has now opened that  
25 door and the state should be allowed to ask the

1 MS. POLK: -- the state knows that there are  
2 lawsuits filed.

3 THE COURT: And do you think that that would  
4 come under a disclosure obligation to have to say  
5 that? Or are you relying on the fact that the  
6 defense must have known that also? Because it  
7 would seem that the cases indicate the fact that a  
8 lawsuit is filed, that is something that goes to  
9 motive or bias. Isn't that something the state  
10 would normally disclose under Kyle Brady  
11 principles?

12 MS. POLK: Your Honor, not necessarily. But  
13 these witnesses have been interviewed. The defense  
14 is the one that attempted to ask them about  
15 lawsuits even though their client is a party to the  
16 lawsuits. Your Honor, these are lawsuits that  
17 their client is a party to.

18 THE COURT: So you're saying you would not  
19 have had to disclose that because they would have  
20 had to have known it?

21 MS. POLK: Yes. And it's not that I --

22 THE COURT: And they're saying they don't have  
23 to disclose it because you must have known it.

24 MS. POLK: Well, two separate issues. First  
25 of all, there are Brady obligations. That is not

1 information within the state's possession.

2 THE COURT: So you're saying you did not know  
3 there were lawsuits filed. Because if you did  
4 know, then it was in your possession, it seems to  
5 me.

6 MS. POLK: Your Honor, the state is aware that  
7 lawsuits were filed. And mostly we learned about  
8 it through the defense interviews of witnesses when  
9 the defendant started asking witnesses about  
10 lawsuits and kind of probing, well, there is a  
11 confidentiality agreement, trying to get witnesses  
12 to talk about the terms. And so that's how we  
13 learned that there were lawsuits. So that's how we  
14 learned about it.

15 Secondly, the Brady obligation applies to  
16 documents that are in our possession. They've  
17 never been in our possession.

18 And thirdly, their client is a party to  
19 those lawsuits. So that -- even if somehow the  
20 Court decided that the state had a Brady obligation  
21 to go out and actively find lawsuits --

22 THE COURT: And I didn't say that, Ms. Polk.  
23 I said if you already knew, though, you had the  
24 information. So I agree, no. You don't have to go  
25 out and investigate. I don't agree with that

1 proposition. I'll tell you that right now. I  
2 don't agree that the state has to go out and  
3 explore every possibility. But when you have  
4 information and possess that, then that question  
5 doesn't even arise.

6 MS. POLK: Yes. And then the next step is  
7 under Rule 15.2, if you intend to use these  
8 documents at trial, you have to disclose them,  
9 period. You have to disclose them.

10 THE COURT: The questioning so far is  
11 permissible. It's cross-examination from a  
12 document that was -- well, I don't know the level  
13 of endorsement. And that is an issue. And  
14 obviously it would have been clear had this matter  
15 been presented at an earlier time.

16 But the questions at this point, as  
17 Mr. Li has indicated, you need a good-faith basis  
18 to ask a question. And that's separate from the  
19 ultimate admissibility of the extrinsic evidence of  
20 the complaint itself. My feeling on that is that  
21 that's a document people have been long aware of.  
22 And it should have been disclosed if it was going  
23 to be offered as actual evidence, extrinsic  
24 evidence. And it wasn't. And the rules require  
25 that. So the complaint itself would not be

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
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14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15               BEFORE THE HONORABLE WARREN R. DARROW  
16               TRIAL DAY TWENTY-FIVE  
17               MARCH 31, 2011  
18               Camp Verde, Arizona

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24                       REPORTED BY  
25                       MINA G. HUNT  
                      AZ CR NO. 50619  
                      CA CSR NO. 8335

09:07:28AM 1 This is not the time to be investigating  
09:07:29AM 2 cases. I said months ago -- it was months ago that  
09:07:34AM 3 I said rules of disclosure are going to be followed  
09:07:37AM 4 and it's not going to be a trial by surprise.

09:07:47AM 5 The case that I believe applies here is  
09:07:53AM 6 State v. Roque.

09:07:53AM 7 Anybody looked at that? That's been  
09:07:53AM 8 brought up before. 213 Ariz. 193. And that case  
09:07:58AM 9 has some distinctions, because in that case the  
09:08:02AM 10 expert whose opinion was not appropriately  
09:08:09AM 11 disclosed, according to the supreme court, that  
09:08:12AM 12 expert had formed the opinion prior to testifying.

09:08:16AM 13 I don't know if that's the case now. But  
09:08:18AM 14 apparently what's at stake here is the information  
09:08:23AM 15 that was provided by counsel yesterday, that I did  
09:08:28AM 16 not see until yesterday. What is apparently  
09:08:35AM 17 involved with regard to Dr. Lyon are all of these  
09:08:43AM 18 additional records to somehow supplement his  
09:08:46AM 19 opinion or something of that nature.

09:08:49AM 20 And, Mr. Hughes, I think you said you  
09:08:52AM 21 don't know if this has had any effect on his  
09:08:55AM 22 opinion.

09:08:55AM 23 MR. HUGHES: Your Honor, Dr. Lyon was in the  
09:08:58AM 24 hallway this morning. I asked him if he had looked  
09:09:01AM 25 at any of these medical records. He told me he'd



09:18:28AM

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Dr. Lyon today.

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The other matter that's going to come up has to do with Mr. and Mrs. Hamilton. That's what was raised first. I've made some comments that apply there to the effect that this is really not the time for investigation. The rules do allow for late disclosure and unusual circumstances. They're there and they'll be applied if that comes up.

But in general, this is not the time, six weeks in to trial, to be investigating matters that have been disclosed and talked about for over a year.

Ms. Do, did you have anything else?

MS. DO: No, Your Honor. Thank you.

THE COURT: Thank you.

(Proceedings continued in the presence of jury.)

THE COURT: The record will show the presence of the defendant, Mr. Ray; the attorneys, the jury.

Ladies and gentlemen, as you know by now, Ms. Rybar is not feeling well today. Diane Troxell, who you've met, she's going to be assisting with the bailiff duties this morning anyway.

If the parties are ready to proceed.

01:51:39PM 1 Q. Okay. You and Dr. Mosley, who were  
01:51:43PM 2 charged with the duty to decide cause of death in  
01:51:46PM 3 this case, wanted more information?  
01:51:48PM 4 A. Correct.  
01:51:49PM 5 Q. Needed more information?  
01:51:50PM 6 A. Correct.  
01:51:51PM 7 Q. Because so far you only had 5 to  
01:51:55PM 8 10 percent medical facts?  
01:51:57PM 9 A. Correct.  
01:51:57PM 10 Q. The other reason you just testified to is  
01:52:00PM 11 to discuss the cause and manner of death?  
01:52:02PM 12 A. Correct.  
01:52:02PM 13 Q. And prior to going into that meeting with  
01:52:06PM 14 the county attorney and the detective, you knew  
01:52:08PM 15 that you had a difference of opinion with  
01:52:10PM 16 Dr. Mosley; correct?  
01:52:11PM 17 A. Correct.  
01:52:11PM 18 Q. And Dr. Mosley had a difference of  
01:52:13PM 19 opinion with you; correct?  
01:52:15PM 20 A. Yes.  
01:52:15PM 21 Q. And so this meeting, in part, was called  
01:52:19PM 22 for you all to have a dialogue?  
01:52:20PM 23 A. Correct.  
01:52:21PM 24 Q. To have a discussion about this?  
01:52:23PM 25 A. Correct.

01:52:23PM 1 Q. Correct?

01:52:24PM 2 A. Correct.

01:52:25PM 3 Q. And because all of these deaths and

01:52:26PM 4 illnesses occurred in connection to one incident,

01:52:32PM 5 you were operating under the belief that the same

01:52:35PM 6 cause affected all of them; correct?

01:52:37PM 7 A. Correct.

01:52:41PM 8 Q. So when you went to this meeting, you

01:52:44PM 9 discussed, in the presence of the county attorney

01:52:47PM 10 and the detectives, your difference of opinion;

01:52:47PM 11 correct?

01:52:50PM 12 A. Correct.

01:52:51PM 13 Q. Do you recall how long that meeting took

01:52:58PM 14 place?

01:52:59PM 15 A. I participated for about an hour. I

01:53:03PM 16 called in late.

01:53:04PM 17 Q. And do you know whether the -- the

01:53:07PM 18 meeting obviously had been occurring when you

01:53:09PM 19 phoned in?

01:53:09PM 20 A. Correct.

01:53:10PM 21 Q. You don't know how long it had been going

01:53:12PM 22 on?

01:53:12PM 23 A. As I recall, about an hour.

01:53:13PM 24 Q. After you hung up, did it end or did it

01:53:16PM 25 continue without your presence, if you remember?

02:57:13PM 1 My objection goes not only to the grounds under 703  
02:57:19PM 2 but specifically to 403.

02:57:21PM 3 This PowerPoint is replete with  
02:57:23PM 4 inaccurate information, misleading information.  
02:57:26PM 5 And I think the Court needs to look at it.

02:57:28PM 6 But just to point out specifically the  
02:57:30PM 7 alleged information provided to this witness  
02:57:33PM 8 regarding Daniel Pfankuch in 2005. It was stated  
02:57:37PM 9 that Mr. Pfankuch was diagnosed with heat stroke.  
02:57:41PM 10 And we know that is absolutely not true.

02:57:43PM 11 THE COURT: May I please see that, Ms. Do?

02:57:45PM 12 MS. DO: Yes.

02:58:12PM 13 THE COURT: Was there a diagnosis of  
02:58:14PM 14 dehydration?

02:58:15PM 15 MS. DO: There was a diagnosis of dehydration,  
02:58:19PM 16 mild dehydration. But it's not the only incident  
02:58:24PM 17 of misleading or inaccurate information. And  
02:58:27PM 18 think that if the Court were to look at every slide  
02:58:30PM 19 in that PowerPoint, just based upon the testimony  
02:58:33PM 20 received in this Court so far, the testimony  
02:58:36PM 21 contradicts the summaries. Not only were they  
02:58:39PM 22 cherry-picked, but they were summarized in a  
02:58:41PM 23 misleading fashion.

02:58:43PM 24 So if this witness is to testify that he  
02:58:44PM 25 relied on this information, we're going to have a

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14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15       BEFORE THE HONORABLE WARREN R. DARROW  
16               TRIAL DAY THIRTY-EIGHT  
17               APRIL 28, 2011  
18               Camp Verde, Arizona

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24                       REPORTED BY  
                      MINA G. HUNT  
                      AZ CR NO. 50619  
25                       CA CSR NO. 8335

02:13:31PM 1 organophosphates poisoning as a possible cause for  
02:13:36PM 2 the death of the three victims, throughout the  
02:13:39PM 3 course of the investigation?

02:13:40PM 4 A. Yes.

02:13:41PM 5 Q. We'll come back to that.

02:13:46PM 6 Did you ever mention the possibility of  
02:13:48PM 7 organophosphates poisoning to the medical examiners  
02:13:52PM 8 in this case?

02:13:53PM 9 A. No.

02:13:53PM 10 Q. Why not?

02:13:53PM 11 A. There was no indication of that.

02:13:56PM 12 MR. KELLY: Your Honor, objection to the  
02:13:57PM 13 response. It's conclusionary in nature.

02:14:01PM 14 THE COURT: Sustained.

02:14:12PM 15 Q. BY MS. POLK: Detective, if you had had  
02:14:13PM 16 information suggesting that the victims had been  
02:14:16PM 17 exposed to organophosphates, would you have  
02:14:18PM 18 provided that to the medical examiners?

02:14:20PM 19 A. Yes.

02:14:29PM 20 Q. On May 20 of 2010, did you have a meeting  
02:14:34PM 21 with the defense attorneys in this case?

02:14:36PM 22 A. Yes.

02:14:37PM 23 Q. And at that time were the various items  
02:14:42PM 24 that had been seized by you in this case -- did you  
02:14:45PM 25 show them, those items, to the defense attorneys?

02:14:48PM 1 A. I did.

02:14:49PM 2 Q. How long did you meet with the defense

02:14:54PM 3 attorneys?

02:14:54PM 4 A. I believe it was that full day. We

02:14:58PM 5 didn't even take a lunch break.

02:15:01PM 6 Q. Did you go through all the items that

02:15:04PM 7 were seized from the scene?

02:15:05PM 8 A. Most of them.

02:15:06PM 9 Q. And were boxes opened and items shown to

02:15:10PM 10 the defense attorneys?

02:15:11PM 11 A. Yes.

02:15:12PM 12 Q. Were you subsequently interviewed by

02:15:16PM 13 Mr. Li?

02:15:17PM 14 A. Yes.

02:15:17PM 15 Q. Do you recall the date?

02:15:19PM 16 A. No. But I can look in my time line.

02:15:23PM 17 Q. Will you do that?

02:15:58PM 18 A. Yes. June 16, 2010.

02:16:02PM 19 Q. And during that interview by Mr. Li, did

02:16:05PM 20 he ever ask you whether you had found evidence of

02:16:10PM 21 organophosphate poisoning?

02:16:11PM 22 A. No.

02:16:12PM 23 Q. Did he ever mention that word to you?

02:16:14PM 24 A. No.

02:16:14PM 25 Q. And during that interview, did Mr. Li ask

02.16.17PM 1 you whether the victims had been exposed -- whether  
02.16.20PM 2 you had found evidence that victims had been  
02.16.22PM 3 exposed to other chemicals at the crime scene?

02.16.26PM 4 A. No.

02.16.28PM 5 Q. Going back to May 20, when you spent the  
02.16.31PM 6 day showing the defense attorneys the evidence that  
02.16.33PM 7 had been seized, were you ever asked by any of them  
02.16.38PM 8 whether you had found any evidence of  
02.16.39PM 9 organophosphate poisoning at the crime scene?

02.16.42PM 10 A. No.

02.16.42PM 11 Q. Were you ever asked at that time whether  
02.16.44PM 12 you had found any evidence of other chemical  
02.16.46PM 13 poisoning of the victims?

02.16.47PM 14 A. No.

02.16.50PM 15 Q. Do you recall a second interview by the  
02.16.54PM 16 defense team that occurred on November 17, 2010,  
02.16.59PM 17 after this Court had ruled on a legal dispute  
02.17.04PM 18 between the parties?

02.17.05PM 19 A. Yes.

02.17.05PM 20 Q. Do you recall which attorney conducted  
02.17.07PM 21 that interview?

02.17.09PM 22 A. I believe it was Truc Do.

02.17.11PM 23 Q. And during that interview, were you asked  
02.17.14PM 24 by Ms. Do or any of the defense attorneys whether  
02.17.18PM 25 you had found any evidence that the victims had



02:17:20PM 1 been exposed to organophosphates?

02:17:24PM 2 A. No.

02:17:24PM 3 Q. Was that word even mentioned to you then?

02:17:27PM 4 A. No.

02:17:30PM 5 Q. During that interview on November 17,

02:17:35PM 6 2010, were you asked by Ms. Do or any other defense

02:17:38PM 7 attorney present whether you had found evidence of

02:17:43PM 8 exposure to other chemicals such as rat poison?

02:17:48PM 9 A. I don't think so.

02:17:51PM 10 Q. Were you, as the case agent, Detective --

02:17:54PM 11 were you present when Mr. Li or Ms. Do interviewed

02:18:01PM 12 the other detectives in this case?

02:18:03PM 13 A. Yes.

02:18:04PM 14 Q. Can you tell the jury the names of the

02:18:06PM 15 other detectives that were interviewed.

02:18:09PM 16 A. Yes. Lieutenant Boelts, who was Sergeant

02:18:13PM 17 Boelts at the time of this incident, and

02:18:16PM 18 Detective Poling. And also -- I believe he was a

02:18:21PM 19 lieutenant. Lieutenant Rhodes at the time.

02:18:24PM 20 Q. What was the date that Lieutenant Boelts

02:18:27PM 21 was interviewed?

02:18:30PM 22 A. It was June 16, 2010.

02:18:33PM 23 Q. Were you present for that interview?

02:18:35PM 24 A. Yes.

02:18:36PM 25 Q. And did the defense attorneys ask

02:18:41PM 1 Lieutenant Boelts whether there was any evidence  
02:18:42PM 2 that the victims had been exposed to  
02:18:44PM 3 organophosphates?  
02:18:45PM 4 A. No.  
02:18:45PM 5 Q. Was that word mentioned in that interview  
02:18:51PM 6 at all?  
02:18:51PM 7 A. No.  
02:18:52PM 8 Q. Was Lieutenant Boelts interviewed a  
02:18:55PM 9 second time after the legal dispute was resolved --  
02:18:56PM 10 was he interviewed a second time on November 17  
02:18:58PM 11 of 2010?  
02:18:58PM 12 A. Yes.  
02:18:59PM 13 Q. Were you present for that interview?  
02:19:02PM 14 A. Yes.  
02:19:02PM 15 Q. Did the defense attorneys ask  
02:19:07PM 16 Lieutenant Boelts in that interview whether there  
02:19:09PM 17 was any evidence that the victims had been exposed  
02:19:12PM 18 to organophosphates?  
02:19:13PM 19 A. No.  
02:19:13PM 20 Q. In either of those interviews, was that  
02:19:16PM 21 word even mentioned?  
02:19:17PM 22 A. No.  
02:19:18PM 23 Q. Were you present when Detective Poling  
02:19:20PM 24 was interviewed on June 16, 2010, by the defense  
02:19:24PM 25 attorneys?

02:19:24PM 1 A. Yes.

02:19:25PM 2 Q. And did the defense attorneys ask  
02:19:28PM 3 Detective Poling during that interview whether or  
02:19:31PM 4 not there was any evidence that -- any evidence of  
02:19:34PM 5 organophosphates with respect to this crime scene?

02:19:37PM 6 A. No.

02:19:37PM 7 Q. And was that word even mentioned?

02:19:40PM 8 A. No.

02:19:40PM 9 Q. Were you present when Detective Rhodes  
02:19:43PM 10 was interviewed on November 17, 2010, by the  
02:19:45PM 11 defense attorneys?

02:19:46PM 12 A. Yes.

02:19:47PM 13 Q. And did the defense attorneys ask  
02:19:51PM 14 Detective Rhodes anything about organophosphates or  
02:19:55PM 15 organophosphate poisoning?

02:19:56PM 16 A. No.

02:19:57PM 17 Q. Was that word even mentioned?

02:19:59PM 18 A. No.

02:19:59PM 19 Q. Were you present when the medical  
02:20:02PM 20 examiners in this case were interviewed?

02:20:05PM 21 A. Yes.

02:20:05PM 22 Q. Were you present when Dr. Fischione of  
02:20:11PM 23 the Maricopa County Medical Examiner's Office was  
02:20:14PM 24 interviewed by the defense attorneys on June 17,  
02:20:16PM 25 2010?

02:20:16PM

1

A. Yes.

02:20:17PM

2

MR. KELLY: Your Honor, object to this line of questioning.

02:20:19PM

3

02:20:19PM

4

THE COURT: Overruled.

02:20:21PM

5

02:20:23PM

6

Q. BY MS. POLK: During that interview, did the defense attorneys ask Dr. Fischione -- did they ask Dr. Fischione anything at all about the possibilities of organophosphate poisoning?

02:20:28PM

7

02:20:32PM

8

02:20:34PM

9

A. No.

02:20:34PM

10

02:20:38PM

11

Q. Was that word mentioned at all or used at all in that interview?

02:20:40PM

12

A. No.

02:20:40PM

13

02:20:44PM

14

02:20:45PM

15

02:20:49PM

16

Q. Were you present when Dr. Fischione was interviewed a second time by the defense team after the resolution of the legal dispute on January 7, 2011?

02:20:49PM

17

A. Yes.

02:20:50PM

18

02:20:52PM

19

02:20:55PM

20

Q. During that interview, did the defense attorneys ask Dr. Fischione anything about the possibility of organophosphate poisoning?

02:20:58PM

21

A. No.

02:20:59PM

22

Q. Did they use at that word at all?

02:21:01PM

23

A. No.

02:21:01PM

24

02:21:05PM

25

Q. Were you present when Dr. Lyon, also of the Maricopa County Medical Examiner's Office, was

02:21:08PM 1 interviewed by the defense attorneys on June 17,  
02:21:12PM 2 2010?

02:21:13PM 3 MR. KELLY: Objection. Calls for a hearsay  
02:21:15PM 4 response of a witness who testified in this court.

02:21:17PM 5 THE COURT: Go ahead and take the afternoon  
02:21:19PM 6 recess at this time.

02:21:20PM 7 Thank you, ladies and gentlemen. Please  
02:21:22PM 8 remember the admonition. Please be reassembled at  
02:21:24PM 9 quarter till. That will be about 20 minutes. And  
02:21:27PM 10 we'll be in recess.

02:21:28PM 11 The parties will remain.

02:21:30PM 12 And, Detective, you may step down, too.

02:21:30PM 13 (Proceedings continued outside presence  
02:21:30PM 14 of jury.)

02:22:04PM 15 The record will show that the jury has  
02:22:07PM 16 left the courtroom.

02:22:08PM 17 Mr. Kelly.

02:22:09PM 18 MR. KELLY: Judge, I've never quite seen this  
02:22:12PM 19 line of questioning. I believe it improperly is  
02:22:15PM 20 attempting to shift the burden of proof onto the  
02:22:17PM 21 defense or somehow imply that they've not been  
02:22:23PM 22 straightforward or honest in terms of our  
02:22:27PM 23 disclosure requirements under Rule 15. And it  
02:22:27PM 24 delves into the strategy that we've incorporated  
02:22:30PM 25 throughout the course of our pretrial preparation.

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                           FOR THE COUNTY OF YAVAPAI

3  
4       STATE OF ARIZONA,       )  
5               Plaintiff,       )  
6               vs.               ) Case No. V1300CR201080049  
7       JAMES ARTHUR RAY,       )  
8               Defendant.       )  
9       \_\_\_\_\_ )

10  
11  
12                           REPORTER'S TRANSCRIPT OF PROCEEDINGS  
13                           BEFORE THE HONORABLE WARREN R. DARROW

14   TRIAL DAY 40

15   MAY 4, 2011

16   Camp Verde, Arizona  
17  
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23   REPORTED BY  
24   MINA G. HUNT  
25   AZ CR NO. 50619  
   CA CSR NO. 8335

03:21:32PM 1 Q. You were asked some questions about  
03:21:41PM 2 information from a person named Rick Haddow. Do  
03:21:50PM 3 you recall testifying at a hearing on February 3rd,  
03:21:57PM 4 2010?

03:21:53PM 5 A. Yes.

03:21:54PM 6 Q. And at that hearing did you testify about  
03:21:58PM 7 an air quality expert?

03:22:00PM 8 A. Yes.

03:22:04PM 9 Q. Mr. Kelly asked you whether the interview  
03:22:08PM 10 that you had with Ms. Do on June 16th of 2010,  
03:22:13PM 11 whether you had told Ms. Do that you had ruled out  
03:22:16PM 12 carbon monoxide as well as carbon dioxide. And you  
03:22:20PM 13 said, no, you had not.

03:22:22PM 14 Do you recall that?

03:22:22PM 15 A. Yes.

03:22:23PM 16 Q. Do you recall what you told Ms. Do during  
03:22:25PM 17 that interview on June 16th, 2010, about carbon  
03:22:31PM 18 dioxide?

03:22:31PM 19 A. Yes.

03:22:31PM 20 Q. And what did you tell her?

03:22:33PM 21 A. That I believed that the deaths were a  
03:22:35PM 22 result of a combination of heat and carbon dioxide.

03:22:38PM 23 Q. Is that consistent with the information  
03:22:40PM 24 that you learned from the man named Rick Haddow?

03:22:44PM 25 A. Yes.

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                           FOR THE COUNTY OF YAVAPAI

3  
4       STATE OF ARIZONA,       )  
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6               vs.               ) Case No. V1300CR201080049  
7       JAMES ARTHUR RAY,       )  
8               Defendant.       )  
9       \_\_\_\_\_ )

10

11

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13

14                       REPORTER'S TRANSCRIPT OF PROCEEDINGS

15                       BEFORE THE HONORABLE WARREN R. DARROW

16                       TRIAL DAY FORTY-ONE

17                       MAY 5, 2011

18                       Camp Verde, Arizona

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REPORTED BY  
MINA G. HUNT  
AZ CR NO. 50619  
CA CSR NO. 8335



01:46:20PM 1 you instruct the jury. And we've submitted some  
01:46:23PM 2 Brady instructions in that regard.

01:46:26PM 3 THE COURT: Ever since the late disclosure of  
01:46:31PM 4 the Haddow report, there has been a real issue,  
01:46:35PM 5 serious issue, in the case. And I brought up  
01:46:39PM 6 yesterday. I asked if the defense was still urging  
01:46:44PM 7 the motion for the mistrial.

01:46:48PM 8 The question about Mr. Haddow -- was  
01:46:51PM 9 there an objection and was that sustained in that  
01:46:55PM 10 exchange?

01:46:56PM 11 MR. KELLY: No, Judge.

01:46:57PM 12 THE COURT: There wasn't an objection?

01:46:59PM 13 MR. KELLY: No.

01:46:59PM 14 THE COURT: Okay. I'm not -- and again --

01:47:03PM 15 MR. KELLY: Judge, can I explain something for  
01:47:06PM 16 the record?

01:47:06PM 17 THE COURT: Yes.

01:47:07PM 18 MR. KELLY: From the beginning of Melissa  
01:47:09PM 19 Phillips on, I've complained to this Court about  
01:47:12PM 20 the nature of the redirect examination and that the  
01:47:15PM 21 requirement that I repeatedly object to the  
01:47:18PM 22 improper form of questions.

01:47:20PM 23 And, again, there is always a strategy  
01:47:22PM 24 decision that takes place during -- while  
01:47:26PM 25 representing someone that you appear to be

01:48:40PM 1 But I don't know why the state brought up  
01:48:42PM 2 the Haddow report. I know that the state has had  
01:48:45PM 3 their own issues with the defense, essentially,  
01:48:49PM 4 testifying on cross-examination by making a  
01:48:53PM 5 statement and then asking a witness sometimes  
01:48:55PM 6 without knowledge, do you agree that this? Do you  
01:48:57PM 7 know that this? And that was that kind of a  
01:49:03PM 8 question from the other side but directly relating  
01:49:08PM 9 to a Brady situation. They don't really equate.

01:49:15PM 10 At this point the motion for mistrial is  
01:49:18PM 11 just, essentially, under advisement. I'm going to  
01:49:21PM 12 continue today.

01:49:24PM 13 The issue of CO2. It has been in the  
01:49:28PM 14 case. It was in the Grand Jury transcript to some  
01:49:32PM 15 level. It's been there. The state absolutely must  
01:49:42PM 16 avoid any further suggestion there is some report  
01:49:46PM 17 out there that sanctions some other inculpatory  
01:49:51PM 18 theory that hinges on CO2.

01:49:57PM 19 But the motion is just, essentially,  
01:49:59PM 20 understand advisement right now.

01:50:00PM 21 Mr. Kelly, is this an extra copy?

01:50:03PM 22 MR. KELLY: That was my copy, Judge. But  
01:50:05PM 23 perhaps we should mark it for the record. And I  
01:50:07PM 24 will do that the next available moment.

01:50:09PM 25 THE COURT: That's why I'm asking. There will

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
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3  
4       STATE OF ARIZONA,       )  
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9       \_\_\_\_\_

10  
11  
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13  
14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15       BEFORE THE HONORABLE WARREN R. DARROW  
16               TRIAL DAY FORTY-TWO  
17               MAY 6, 2011  
18               Camp Verde, Arizona

19  
20  
21  
22  
23  
24                               REPORTED BY  
25                               MINA G. HUNT  
                              AZ CR NO. 50619  
                              CA CSR NO. 8335

10:34:40AM 1 Q. What was the exact language in that  
10:34:42AM 2 letter?

10:34:43AM 3 A. The state has been informed by a lab  
10:34:50AM 4 employee, Dr. Blume, that the organophosphates test  
10:34:51AM 5 result may not be significant due to the passage of  
10:34:55AM 6 time between when the blood was drawn and the time  
10:35:02AM 7 Blume lab tested the samples. Blume also indicated  
10:35:04AM 8 that the result of the test could be affected by  
10:35:07AM 9 the way the blood samples were stored. And then  
10:35:12AM 10 parenthetically he said, frozen or refrigerated.

10:35:15AM 11 Q. That letter then prompted you to write an  
10:35:17AM 12 email back to the state; correct?

10:35:19AM 13 A. Yes.

10:35:20AM 14 Q. And in that email is when you told the  
10:35:22AM 15 state that you thought it was a waste of time and  
10:35:26AM 16 money to test; correct?

10:35:27AM 17 A. I did.

10:35:28AM 18 Q. And that was because it was your belief  
10:35:30AM 19 that testing at this late date, almost 17 months  
10:35:35AM 20 later, was a waste of time; correct?

10:35:38AM 21 A. Yes.

10:35:38AM 22 Q. In fact, you previously have said that it  
10:35:41AM 23 would be a dangerous thing to do?

10:35:46AM 24 A. Well, I might have. I don't recall  
10:35:48AM 25 saying that. But --

10:38:32AM 1 admonition. Please be reassembled at five till,  
10:38:35AM 2 about 15 minutes.

10:38:36AM 3 Dr. Mosley, you're excused at this time.

10:59:07AM 4 (Recess.)

10:59:08AM 5 THE COURT: The record will show the presence  
10:59:10AM 6 of Mr. Ray, the attorneys, the jury. Dr. Mosley is  
10:59:13AM 7 on the witness stand.

10:59:14AM 8 Ms. Do, you may continue.

10:59:16AM 9 MS. DO: Thank you, Your Honor.

10:59:17AM 10 Q. Dr. Mosley, thank you so much for your  
10:59:21AM 11 patience.

10:59:22AM 12 Before we took the break, I was asking  
10:59:23AM 13 you questions about the conversation that you had  
10:59:26AM 14 with Detective Diskin after he requested in either  
10:59:30AM 15 February or March of 2011, this year, that  
10:59:33AM 16 Ms. Neuman's blood be tested for organophosphates.  
10:59:37AM 17 So let's pick it up from there.

10:59:38AM 18 You have had a chance at the break to  
10:59:40AM 19 review the transcript of our conversation on  
10:59:42AM 20 April 19, 2011?

10:59:43AM 21 A. I have.

10:59:44AM 22 Q. And it is true that you told  
10:59:46AM 23 Detective Diskin at the time he made the request --  
10:59:50AM 24 you told him that, given the passage of time, it  
10:59:53AM 25 would be something like a shot in the dark;

10:59:57AM 1 correct?

10:59:56AM 2 A. That is, essentially, what I was trying  
10:59:58AM 3 to communicate.

10:59:58AM 4 Q. And what you were trying to communicate  
11:00:00AM 5 to Detective Diskin was, given the passage of time  
11:00:04AM 6 and also the information confirmed in the letter by  
11:00:08AM 7 Mr. Hughes in Exhibit 1001, that the reliability of  
11:00:14AM 8 the test is also affected by the way the sample is  
11:00:17AM 9 preserved; correct?

11:00:19AM 10 A. Correct.

11:00:19AM 11 Q. So if it's a frozen sample, that's going  
11:00:21AM 12 to create problems in terms of testing; correct?

11:00:24AM 13 A. Correct.

11:00:25AM 14 Q. And in this case, Ms. Neuman's sample was  
11:00:28AM 15 frozen; correct?

11:00:29AM 16 A. Correct.

11:00:29AM 17 Q. And, to your knowledge, so was  
11:00:32AM 18 Mr. Brown's and Ms. Shore's; correct?

11:00:36AM 19 A. I don't know about their samples.

11:00:39AM 20 Q. That's fine. But based upon the letter  
11:00:41AM 21 that was emailed to you by Penny Kramer, March 3rd,  
11:00:45AM 22 it does seem to indicate that that was the problem  
11:00:48AM 23 with Mr. Shore and Ms. Brown; correct?

11:00:55AM 24 Do you want to see the letter again?

11:00:58AM 25 A. Yes.

11:03:47AM 1 information to Mr. Hughes contained in the letter,  
11:03:50AM 2 Exhibit 1001, is a toxicologist; correct?

11:03:52AM 3 A. As I understand it, yes.

11:03:53AM 4 Q. Within your experience and your  
11:03:56AM 5 knowledge, however, you do have a belief that to  
11:03:59AM 6 test something -- to test an autopsy sample more  
11:04:04AM 7 than a week after someone has died would be -- and  
11:04:07AM 8 to take an interpretation of that sample would be  
11:04:10AM 9 dangerous or foolish; correct?

11:04:13AM 10 A. In this particular case, in this  
11:04:15AM 11 instance, yes.

11:04:16AM 12 Q. What you mean when you say it's dangerous  
11:04:19AM 13 or foolish is to say that because of the passage of  
11:04:21AM 14 time, some 17 months or more, and the way in which  
11:04:26AM 15 the sample was preserved, to look at a negative  
11:04:30AM 16 result and say, it wasn't there, that could be a  
11:04:32AM 17 wrong conclusion; correct?

11:04:33AM 18 A. Correct.

11:04:33AM 19 Q. So what you're telling the jury is that  
11:04:33AM 20 even though the negative results on Ms. Neuman and  
11:04:37AM 21 Mr. Shore or Ms. Brown, those negative results does  
11:04:42AM 22 not mean you can say organophosphates weren't  
11:04:46AM 23 there; correct?

11:04:47AM 24 A. That's correct.

11:04:52AM 25 Q. You told the jury in direct that

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                           FOR THE COUNTY OF YAVAPAI

3  
4       STATE OF ARIZONA,       )  
5               Plaintiff,       )  
6               vs.               ) Case No. V1300CR201080049  
7       JAMES ARTHUR RAY,       )  
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9       \_\_\_\_\_ )

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14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15       BEFORE THE HONORABLE WARREN R. DARROW  
16               TRIAL DAY FORTY-SEVEN  
17                       MAY 27, 2011  
18               Camp Verde, Arizona

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24                               REPORTED BY  
25                               MINA G. HUNT  
                              AZ CR NO. 50619  
                              CA CSR NO. 8335



11:31:02AM 1 THE COURT: Yes.

11:31:15AM 2 (Sidebar conference.)

11:31:25AM 3 MS. POLK: Judge, this next thing that  
11:31:18AM 4 Mr. Rock is going to testify to I thought I would  
11:31:20AM 5 just approach because I anticipate Mr. Kelly will  
11:31:24AM 6 object. And just allowing them to do it at the  
11:31:28AM 7 bench instead of in front of the jury.

11:31:30AM 8 Mr. Rock speaks to a couple of Dream Team  
11:31:33AM 9 members who have been interviewed by the police.  
11:31:35AM 10 And they tell him not to cooperate, that the police  
11:31:39AM 11 are trying to frame James Ray.

11:31:41AM 12 And so when Mr. Rock gives his statement,  
11:31:43AM 13 he is not cooperative. And that's his explanation  
11:31:47AM 14 for not being cooperative. And some of the  
11:31:49AM 15 statements that the jury heard today, he did not  
11:31:52AM 16 provide that to the police at the time. He'll  
11:31:56AM 17 explain his healing process and when he did finally  
11:32:00AM 18 speak to the police.

11:32:01AM 19 I believe it's relevant to explain why he  
11:32:05AM 20 did not give the police the full story that he's  
11:32:09AM 21 given the jury today. But I thought I would just  
11:32:11AM 22 approach and let Mr. Kelly make his objections here  
11:32:15AM 23 at the bench.

11:32:16AM 24 MR. KELLY: Judge, perhaps, then, Mr. Rock  
11:32:19AM 25 could be considered for being prosecuted for

12:12:13PM 1 September of 2010 and provided to the defense.

12:12:16PM 2 MR. KELLY: Let me be more brief, more clear.

12:12:20PM 3 It's a Fifth Amendment issue. He's telling us --

12:12:23PM 4 he's telling the Yavapai County Attorney herself

12:12:25PM 5 that he intentionally lied to a police officer on

12:12:28PM 6 October 8, 2009. Given that, Judge, he has rights.

12:12:35PM 7 He needs counsel.

12:12:38PM 8 MS. POLK: Your Honor, that's a

12:12:39PM 9 mischaracterization. Mr. Rock has never told

12:12:42PM 10 anybody that he intentionally lied.

12:12:46PM 11 MR. KELLY: Judge, when somebody says, don't

12:12:49PM 12 tell the truth. We're protecting James Ray, that's

12:12:52PM 13 intent.

12:12:54PM 14 THE COURT: And I'm -- in these situations

12:13:00PM 15 it's necessary to look at the interest in Mr. Rock,

12:13:04PM 16 Ms. Polk, at this point. And you're putting me in

12:13:09PM 17 a very awkward position. County attorney. You've

12:13:13PM 18 been in that position for over 11 years almost.

12:13:17PM 19 And I believe strongly in the separation of powers,

12:13:22PM 20 and I don't like to indicate what should be done.

12:13:27PM 21 And, again, I'm at the real disadvantage

12:13:30PM 22 of hearing all of this now with interviews from

12:13:32PM 23 here and statements there, two different sets of

12:13:39PM 24 sworn testimony at this time.

12:13:41PM 25 But just from looking at it, as a judge,

12:13:46PM 1 and hearing this and someone coming forward right  
12:13:49PM 2 now and saying, by the way, I didn't give the whole  
12:13:52PM 3 story back whenever -- you know -- no matter what  
12:13:56PM 4 kind of a case.

12:13:57PM 5 But in this particular matter -- and this  
12:14:01PM 6 is why I didn't. If that's the gist of it, I just  
12:14:06PM 7 have a concern about that. And I'm almost stepping  
12:14:09PM 8 aside, really stepping aside from this case, just  
12:14:12PM 9 what happens when you have a witness in that  
12:14:15PM 10 position.

12:14:16PM 11 MS. POLK: Your Honor, this witness -- it's  
12:14:18PM 12 not new information that he didn't give a full  
12:14:20PM 13 story that night. That has been known since  
12:14:23PM 14 September when he gave the full interview.

12:14:26PM 15 THE COURT: But that doesn't change the fact  
12:14:27PM 16 that -- okay. I see. So you're saying if there  
12:14:32PM 17 has been harm done, it's already done. That's what  
12:14:34PM 18 you're saying.

12:14:35PM 19 MS. POLK: This witness, like many witnesses,  
12:14:37PM 20 gave a more complete statement later. I fail to  
12:14:41PM 21 see how that is any different than some of the  
12:14:44PM 22 other witnesses who that night gave brief  
12:14:47PM 23 statements and then later gave a more complete  
12:14:50PM 24 statement.

12:14:50PM 25 This witness gave a complete statement in

01:43:41PM 1 That's the only reason I have offered that envelope  
01:43:43PM 2 and I don't believe since it involves privileged  
01:43:46PM 3 communications, either party the defense or the  
01:43:49PM 4 state has a right to access that information.

01:43:52PM 5 THE COURT: Well this matter is going to be  
01:43:54PM 6 sealed. This is going to be sealed it will not be  
01:43:57PM 7 opened unless there is further order of the Court  
01:43:59PM 8 or until there is further order I'm not going to  
01:44:02PM 9 look at it either. I don't know what's in here.

01:44:04PM 10 MR. LAUNDERS: I've told my client that he  
01:44:06PM 11 should exercise his fifth amendment rights and  
01:44:09PM 12 refuse the use immunity that the state is offering  
01:44:12PM 13 him. Thus far Mr. Rock has indicated he wishes to  
01:44:15PM 14 accept that use immunity and present himself as a  
01:44:18PM 15 witness and submit himself to direct and  
01:44:22PM 16 cross-examination.

01:44:23PM 17 THE COURT: I'm going to ask you from your  
01:44:24PM 18 perspective first Mr. Launders, did you have  
01:44:27PM 19 sufficient time to go over the case with Mr. Rock.

01:44:34PM 20 MR. LAUNDERS: Yes, Your Honor I got all the  
01:44:36PM 21 information I needed last Friday and I talked at  
01:44:39PM 22 some length in three or four conversations with  
01:44:42PM 23 Mr. Rock this weekend.

01:44:44PM 24 THE COURT: And you were able to fully explain  
01:44:48PM 25 what use immunity and discuss all those aspects.

01:51:33PM 1 paperwork provided to me. That's how I've seen it  
01:51:38PM 2 did not.

01:51:38PM 3 MR. HUGHES: Your Honor the state will prepare  
01:51:40PM 4 a statement that we can provide to Mr. Launders,  
01:51:45PM 5 Mr. Rock, obviously with copies to the defense  
01:51:48PM 6 indicating that we are granting the full use  
01:51:52PM 7 immunity to Mr. Rock.

01:51:55PM 8 MR. LAUNDERS: Let me interject one thing for  
01:51:58PM 9 my client who doesn't want to listen to his lawyers  
01:52:01PM 10 advise. The use immunity does not cover a witness  
01:52:05PM 11 who somebody figures has perjured themselves.  
01:52:08PM 12 That's a glaring omission in everything that  
01:52:10PM 13 everybody said thus far. The use immunity that the  
01:52:13PM 14 state can provide this witness encompasses a great  
01:52:18PM 15 deal. But it does not encompass someone who is  
01:52:24PM 16 determined to perjure themselves.

01:52:27PM 17 THE COURT: Mr. Rock did you hear Mr. Launders  
01:52:29PM 18 just then.

01:52:32PM 19 MR. ROCK: I'm sorry, the last probably five  
01:52:35PM 20 minutes, I haven't been able to hear much.

01:52:38PM 21 THE COURT: You do need to hear this last  
01:52:40PM 22 thing. Mr. Launders would you please step forward.  
01:52:44PM 23 I'd request you do that. Get closer to the  
01:52:47PM 24 speakerphone ^ over here ^ overhear. You need to  
01:52:53PM 25 come to the phone. That's the actual problem.

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                       FOR THE COUNTY OF YAVAPAI

3  
4       STATE OF ARIZONA,       )  
5               Plaintiff,       )  
6               vs.               ) Case No. V1300CR201080049  
7       JAMES ARTHUR RAY,       )  
8               Defendant.       )  
9       \_\_\_\_\_ )

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11  
12  
13  
14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15       BEFORE THE HONORABLE WARREN R. DARROW  
16               TRIAL DAY FORTY-EIGHT  
17                       JUNE 1, 2011  
18               Camp Verde, Arizona

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24                               REPORTED BY  
25                               MINA G. HUNT  
                              AZ CR NO. 50619  
                              CA CSR NO. 8335

10:20:01AM 1 relevance at this point in time. He explained that  
10:20:06AM 2 based on that conversation, it may have possibly  
10:20:09AM 3 affected his statement to Detective Parkinson. Why  
10:20:13AM 4 would it be necessary to talk about the  
10:20:16AM 5 conversation, which is clearly hearsay?

10:20:17AM 6 And, of course, also, Judge, we have  
10:20:19AM 7 significant Sixth Amendment problems because I  
10:20:22AM 8 cannot confront and cross-examination the purported  
10:20:27AM 9 maker of the statement.

10:20:32AM 10 THE COURT: Ms. Polk.

10:20:33AM 11 MS. POLK: Your Honor, it's a statement not  
10:20:35AM 12 offered to prove the truth of the matter asserted,  
10:20:37AM 13 but offered to provide the context for inconsistent  
10:20:42AM 14 statements.

10:20:47AM 15 THE COURT: I just looked at the answer. He's  
10:20:50AM 16 speculating it's a possibility. He did not think  
10:20:53AM 17 it was at the time. The evidence is now there that  
10:20:56AM 18 possibly somebody said something to him that could  
10:20:59AM 19 have affected his -- it being how he first  
10:21:06AM 20 described what he observed.

10:21:21AM 21 There is just speculating now it's a  
10:21:23AM 22 possibility. So I don't see the foundation for it  
10:21:30AM 23 for going any further. So sustained.

10:21:34AM 24 MR. KELLY: Your Honor, if I may have a couple  
10:21:37AM 25 minutes, I believe we now have a much more serious

10:21:40AM 1 problem in this case. It relates to the earlier  
10:21:41AM 2 discussion. And, again, these are simply my notes.

10:21:44AM 3 THE COURT: Mr. Kelly, before you get started  
10:21:46AM 4 on that, I want to check. Apparently a juror is  
10:21:50AM 5 not feeling well. I'd like to ask Ms. Rybar.

10:21:53AM 6 Is it a bad situation?

10:22:00AM 7 THE BAILIFF: I can't tell you right now.  
10:22:02AM 8 He's in the rest room. I'll let you know as soon  
10:22:02AM 9 as --

10:22:04AM 10 THE COURT: Okay. Thank you. I'll wait until  
10:22:05AM 11 he's back. There is a consideration.

10:22:08AM 12 Mr. Kelly, go ahead.

10:22:09AM 13 MR. KELLY: Here's the problem: This has been  
10:22:11AM 14 briefed and argued. I may have been mispronouncing  
10:22:15AM 15 this. But the Nappu versus Illinois case of 1959.  
10:22:18AM 16 It's well settled that the -- that the government  
10:22:23AM 17 cannot present false testimony. And the standard  
10:22:26AM 18 is that the testimony was actually false.

10:22:30AM 19 Secondly, that the prosecution knew or  
10:22:34AM 20 should have known that the testimony was actually  
10:22:37AM 21 false. And the third prong is that the false  
10:22:40AM 22 testimony was material.

10:22:41AM 23 We have, given Ms. Polk's offer,  
10:22:44AM 24 determined, I would submit, Judge, that the  
10:22:46AM 25 testimony is material. Now, Judge, as to prong 1,



10 22:52AM 1 that the testimony was actually false today,  
10 22:57AM 2 Mr. Rock said in response to one of Ms. Polk's  
10 23 01AM 3 questions -- and again I'm paraphrasing, so I'm not  
10:23:04AM 4 trying to mislead the Court. He said, today I  
10:23:06AM 5 understand that it was really hot in the sweat  
10:23:11AM 6 lodge. It was suffocating in 2009.

10 23:14AM 7 That is contrary to his sworn statement  
10:23:17AM 8 on November 16; his statement provided to  
10:23:22AM 9 Detective Boelts on October 29, 2009; contrary to  
10:23:26AM 10 his statement provided to Detective Parkinson on  
10 23:29AM 11 October 8, 2009. And it's clearly false.

10:23:39AM 12 So he has either -- because if you recall  
10:23:42AM 13 last Friday's argument -- and we have now marked as  
10:23:47AM 14 Exhibit 1068 the transcript from the proceedings of  
10:23:52AM 15 November 16, 2010, in front of this court -- the  
10:23:54AM 16 question was posed, can we rely upon -- under oath  
10:23:58AM 17 can we rely upon the substance of your conversation  
10:24:01AM 18 on October 8, 2009, as true.

10 24:04AM 19 He said, yes.

10 24:06AM 20 Today he says now, all of a sudden, as to  
10 24:11AM 21 the material fact, that it was really hot and  
10:24:13AM 22 suffocating, on June 1, 2011.

10:24:17AM 23 The reason I point out, I believe, our  
10:24:22AM 24 issue that we've discussed this morning has now  
10:24:25AM 25 come to fruition, is that based on this United

10:24:29AM 1 States Supreme Court case, I would submit, Judge,  
10:24:32AM 2 the prosecution either knows or should know of a  
10:24:37AM 3 false testimony.

10:24:38AM 4 And given that, Judge, I would submit  
10:24:41AM 5 that we simply cannot proceed in court in Yavapai  
10:24:45AM 6 County, Arizona, with false testimony. We need to  
10:24:48AM 7 start considering remedies versus this continued  
10:24:52AM 8 attempt to explain away statements which are  
10:24:57AM 9 actually favorable to the defense, exculpatory  
10:25:01AM 10 statements. The state's continued attempt to  
10:25:05AM 11 explain away those exculpatory statements is  
10:25:08AM 12 improper, Judge.

10:25:10AM 13 THE COURT: Ms. Polk.

10:25:11AM 14 MS. POLK: Your Honor, Mr. Rock has taken an  
10:25:14AM 15 oath to tell the truth, to testify truthfully. And  
10:25:18AM 16 he is testifying that he gave incomplete statements  
10:25:23AM 17 earlier on and that it's been a process of recall  
10:25:26AM 18 today.

10:25:27AM 19 He has testified that what he talked  
10:25:31AM 20 about in the earlier interviews with law  
10:25:34AM 21 enforcement was not a complete statement and has  
10:25:36AM 22 testified under oath that what he's providing today  
10:25:39AM 23 is the truth of that. I'm not sure what the issue  
10:25:42AM 24 is.

10:25:43AM 25 THE COURT: Mr. Kelly.

10:25:44AM 1 MR. KELLY: Judge, he did testify. And,  
10:25:47AM 2 again, the record speaks for itself that he had a  
10:25:50AM 3 suppressed memory and he can't tell you exactly  
10:25:52AM 4 when he remembered this fact. However, it was  
10:25:54AM 5 before the end of 2009. He was not under any type  
10:25:58AM 6 of altered state. He was not in some debilitating  
10:26:03AM 7 emotional condition, and he was under oath on  
10:26:06AM 8 November 16, 2010, when he swore to this court that  
10:26:13AM 9 his interview of October 8, 2009, was correct. And  
10:26:18AM 10 that was that the heat level between the two sweat  
10:26:22AM 11 lodges was the same.

10:26:25AM 12 So either he has lied in November 16,  
10:26:30AM 13 2010, or June 1, 2011. And the issue is, Judge, as  
10:26:36AM 14 briefed, is that in a free, democratic society we  
10:26:42AM 15 do not present false testimony to convict people.  
10:26:46AM 16 We don't know what the jury is going to rely on.  
10:26:49AM 17 That's the problem.

10:26:50AM 18 It's not simply one of impeachment,  
10:26:51AM 19 pleading the record, Rule 106, my ability to bring  
10:26:54AM 20 out inconsistent statements, or even telling this  
10:26:57AM 21 jury that he's been provided use immunity by the  
10:27:01AM 22 State of Arizona. That helps.

10:27:01AM 23 But the real issue is in the state of  
10:27:06AM 24 Arizona we do not allow convictions to be premised  
10:27:09AM 25 upon false testimony. Something is not true.

10:27:14AM 1 That's my point. I don't want to call the man a  
10:27:18AM 2 liar, but at some point in time between October 8,  
10:27:22AM 3 2009, and today he's not telling the truth.

10:27:25AM 4 If he wants to rely on his emotional  
10:27:28AM 5 condition and his altered state -- you saw his  
10:27:36AM 6 demeanor on November 16, 2010. His only emotional  
10:27:40AM 7 state was anger towards me. It was not anything  
10:27:44AM 8 relating to his ability to recollect. He didn't  
10:27:47AM 9 have -- unless that's an altered stated.

10:27:51AM 10 Anyway, Judge, I've made my record. I  
10:27:52AM 11 believe it's a serious concern. And I ask you to  
10:27:55AM 12 consider it. I believe the real discussion should  
10:27:58AM 13 be what's the appropriate remedy in the spectrum  
10:28:02AM 14 from some type of striking of his testimony and the  
10:28:05AM 15 jury instruction to a mistrial. I'm not sure. But  
10:28:08AM 16 it is, in my opinion, Judge, quite serious.

10:28:18AM 17 THE COURT: These are topics for  
10:28:23AM 18 cross-examination. He's provided his explanation  
10:28:28AM 19 for differences. And it is a matter for  
10:28:33AM 20 cross-examination.

10:28:36AM 21 We need to see how the juror is doing.  
10:28:40AM 22 But I do want to resume by quarter till. We'll  
10:28:44AM 23 just have to see.

10:28:50AM 24 Thank you.

10:28:50AM 25 (Recess.)

<p>1 A I received the email on five six May 6 2 of 2010 3 Q And then you /PHRAEULD it out on may 10? 4 A That's correct 5 Q Prior to receiving a request that 6 originated with the defense for your notes, did 7 anyone from the county attorney's office or the 8 sheriff's office ask you for your notes? 9 A No 10 Q You mentioned that the next thing that 11 happened was an an interview? 12 A Correct 13 Q And do you know who asked for that 14 interview? 15 A Again, it was a request by the defense 16 Q Did that interview take place? 17 A It did 18 Q At that interview was Mr. Li ^ who 19 is ^ whose in court present? 20 A Yes he was 21 Q And was I the one present asking you 22 questions? 23 A You were 24 Q And do you remember the date of that 25 interview?</p>	145	<p>1 17 2010, had you ever met with Detective Diskin on 2 this case regarding your at cetera results? 3 A I had not met with him 4 Q And on that date of June 17 2010, you 5 were gracious enough to /TKPW-FPL you some time and 6 we asked you questions about this case /-FRPLG 7 that's correct? 8 Q Do you recall me asking you specifically 9 some questions about the presence of a chemical 10 called 2-ethyl 1-hexonal? 11 A Yes 12 Q Before I asked you the question on 13 June 17 2010 of what two 2-ethyl 1-hexonal was did 14 fin from the state ask you what that chemical was? 15 A No 16 Q Let me move now forward into trial You 17 are here testifying as a witness in this trial? 18 A Yes 19 Q At any time while this trial was in 20 progress before this jury, did you ever receive a 21 phone call from the county attorney's office? 22 A I did 23 Q And who called you? 24 A The county attorney Sheila Polk 25 Q Do you see Ms. Polk in courts today?</p>
<p>1 A I have that written down It was the 2 17th of June 2010 3 Q Prior to receiving a request to be 4 interviewed by the defense on /SKWROUPB 17 2010 5 were you ever interviewed by the county attorney's 6 office regarding the result of your /TEFTD? 7 A I was not 8 Q Were you ever asked any /KWOERS 9 interviewed by the sheriff's office about your 10 results? 11 A I was not 12 Q I'm going to show you Exhibit 726 for 13 identification Does that look like the transcript 14 of the interview that Mr. Li and I conducted of you 15 on June 17 2010? 16 A It does 17 Q Do you recall who else was present? 18 A I have that written down also it's on the 19 front it was you Mr. Li, 70 Sisneros and Detective 20 Diskin 21 Q And 70 Sisneros did you understand that 22 he was a deputy county attorney who worked for 23 Ms. Polk? 24 A I understand he was /TPWR theirs office 25 Q Prior to seeing Detective Diskin on June</p>	146	<p>1 A I think so, but I don't really know her 2 I haven't met with her 3 Q Also the lady in red? 4 A Yes 5 Q And was anyone else on /TPOEB call on the 6 phone call other than Ms. Polk? 7 A I believe Detective Diskin was on the 8 phone I did not float it I'm not positive 9 Q And do you remember when approximately 10 this phone call took place? 11 A It was sometime at the end of April I 12 believe or in April sometime 13 Q We're now into 2011 you believe at the 14 ends of April was the first time you talked to 15 Ms. Polk, is that right? 16 A Correct 17 Q And you also spoke to Detective Diskin on 18 that date? 19 A I believe he was in on the conversation 20 Q Do you know if that conversation was 21 audio recorded /TPWHEUPB? 22 A I do not know 23 Q Have you ever seen a report written by 24 Detective Diskin generated about your discussion 25 your phone call on this date at the end of</p>

<p>1 April 2011?</p> <p>2 A I have not</p> <p>3 Q Tell us what the conversation was?</p> <p>4 A From what I recall the question had come</p> <p>5 up as to whether I could have detected</p> <p>6 organo-phosphates in the analysis the ex /TRAPBGS I</p> <p>7 had performed in this case</p> <p>8 Q Could you detect in your analysis the</p> <p>9 presence of organo-phosphates?</p> <p>10 A Correct</p> <p>11 Q Who asked you that question?</p> <p>12 A Again, the /KOUP /TEU attorney Sheria</p> <p>13 Polk</p> <p>14 Q And that occurred somewhere at the end of</p> <p>15 April 2011, is that right?</p> <p>16 A Yes</p> <p>17 Q And again prior to that date, that phone</p> <p>18 call, had you ever talked to Ms. Polk about the</p> <p>19 result of your analysis?</p> <p>20 A I had not</p> <p>21 Q Did /TPHAOEGT either Ms. Polk pour</p> <p>22 Detective Diskin tell you with what prompted that</p> <p>23 question posed to you almost four months into trial</p> <p>24 or three months into trial rather?</p> <p>25 A They did not say specifically</p>	<p>1 cross-examination /-D by Mr. Kelly?</p> <p>2 A I do not know</p> <p>3 Q The question posed do you on that date</p> <p>4 did the test you ran on this case that you started</p> <p>5 on January 20 2010 /RBGS is that the test we're</p> <p>6 referring to?</p> <p>7 A Yes</p> <p>8 Q Did that test could that test detect the</p> <p>9 presence of organo-phosphates?</p> <p>10 A That's what I was asked, yes</p> <p>11 Q Okay And you told Ms. Polk that you</p> <p>12 didn't know?</p> <p>13 A I did not know the answer to that It</p> <p>14 would be something I would have to test</p> <p>15 Q Ex mean that a little bit more so he can</p> <p>16 understand (explain)?</p> <p>17 A To know if my extraction specifically</p> <p>18 would ^ pick up ^ pickup an organization if the</p> <p>19 instrument I used had the ability or sensitivity to</p> <p>20 detect it I would actually have to test it using</p> <p>21 the method I used to test the items of evidence in</p> <p>22 this case and see what I got as a result But I</p> <p>23 would need to know specifically what</p> <p>24 organo-phosphates you were looking for because it's</p> <p>25 a very broad class of compound</p>
<p>1 Q But you do recall specifically the</p> <p>2 question being about organo-phosphates?</p> <p>3 A Yes</p> <p>4 Q And what did you tell them?</p> <p>5 A I told them I did not know if my</p> <p>6 extraction would allow me to detect an</p> <p>7 organo-phosphates and that to know, I would have to</p> <p>8 test it and organo-phosphates there are quite a</p> <p>9 number of them and to know specifically I would</p> <p>10 need to know what specific one we were looking for</p> <p>11 Q Okay So based upon your training your</p> <p>12 experience you did understand what</p> <p>13 organo-phosphates were?</p> <p>14 A Yes</p> <p>15 Q Could you tell the jury?</p> <p>16 A Organo-phosphates are just organic</p> <p>17 compounds contain /-G a /TPOS /RUS molecule It's</p> <p>18 used in a number of things including insecticides</p> <p>19 or pesticide /-Z</p> <p>20 Q On this date the end of April 2011 By</p> <p>21 the way did you /TPHROETS /WRORPB Detective Diskin</p> <p>22 had testified to this jury on April 29 2011?</p> <p>23 A I do not know</p> <p>24 Q Do you know if that phone call took place</p> <p>25 before or after Detective Diskin was first</p>	<p>1 Q In this case you already told the jury</p> <p>2 that the request was a request for volatiles?</p> <p>3 A Correct</p> <p>4 Q We'll get into little more did he /TAELZ</p> <p>5 so the jury nose what test you actually ran The</p> <p>6 test you actually ran was not did he /SAOEUPBDZ to</p> <p>7 look for organo-phosphates?</p> <p>8 MR HUGHES Objection leading question</p> <p>9 THE COURT Overruled you may answer that</p> <p>10 THE WITNESS Can you repeat the question</p> <p>11 Q BY MS DO Sure the test you ran in this</p> <p>12 case, was it designed to detect the presence of</p> <p>13 organo-phosphates?</p> <p>14 A No, it was not</p> <p>15 Q And that was the question Ms. Polk posed</p> <p>16 to you at the end of April 11?</p> <p>17 A She posed could the extraction I did</p> <p>18 detect an organo-phosphates</p> <p>19 Q And you told her?</p> <p>20 A I did not know the answer to that</p> <p>21 question</p> <p>22 Q And at some point did you further</p> <p>23 research that question?</p> <p>24 A I looked up to see how organo-phosphates</p> <p>25 are tested</p>

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1 Q Okay Now do you have any idea whether  
2 or not that information you gave to Ms Polk was  
3 then provided to the defense in this case?  
4 A He do not /STKPWHROE and again, have you  
5 ever seep a report memorializing that question with  
6 you Ms Polk and Detective Diskin  
7 A I have not  
8 Q Some time after that conversation you had  
9 with Ms Polk and Detective Diskin at the end of  
10 April, were you contacted by the county attorney's  
11 office regarding your appearance as a witness in  
12 this case?  
13 A I was  
14 Q And do you recall would /WA\* that was?  
15 A A /TKA think /TKUR /ER I believe  
16 Q Can you know whether or not ^ Miss ^ miss  
17 /TKUR /ER works I see Do you know if this is  
18 ^ Miss ^ miss /TKUR /ER in the back there?  
19 A Yes  
20 Q And ^ Miss ^ miss /TKUR /ER contacted you  
21 by telephone?  
22 A Yes, I also spoke to a /PE any /KRAEUPL  
23 /ERBGS I'm not sure which one of those contacted me  
24 originally  
25 Q All right Were they contacting you on

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1 behalf of Ms Polk?  
2 A Yes  
3 Q So originally, were you subpoenaed by the  
4 state?  
5 A I was  
6 Q To testify as a witness in their case in  
7 chief?  
8 A I was  
9 Q After you spoke to Ms Polk and Detective  
10 Diskin at the end of April 2011 about whether or  
11 not your test could detect the presence of  
12 organo-phosphates were you told whether you were  
13 needed ^ any more ^ anymore?  
14 A Yes I was told to show up here on a  
15 specific date  
16 Q And did you show up?  
17 A I did  
18 Q And what date was that?  
19 A It was I would have to actually look at a  
20 calendar It was a Friday the first week in may  
21 Friday  
22 Q And you came from Phoenix /FRPL yes, I  
23 did?  
24 Q Is it a long drive?  
25 A It's about an hour and a half

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1 Q You actually got to this courthouse when  
2 you got here did you flow whether or not trial was  
3 in progress in front of the jury?  
4 A I knew that trial was in progress  
5 Q When you got here did you speak to  
6 Ms Polk or Mr Hughes?  
7 A I spoke with Mr Hughes briefly on that  
8 day  
9 Q About what?  
10 A Just that he was delayed in calling me  
11 I don't remember exactly what we talked about I  
12 also received at that point a copy of or a  
13 transcript copy of the transcript of my interview  
14 with you  
15 Q Okay The one that you have in front of  
16 you?  
17 A Yes  
18 Q Were you ultimately called that?  
19 A I was not called on that day  
20 Q After you appeared, you drove an hour and  
21 a half from Phoenix up to Camp Verde and after your  
22 conversation with Ms Polk and Detective Diskin,  
23 were you told whether or not you ^ needed to ^ need  
24 today appear ^ any more ^ anymore that was a bad  
25 question Let me ask you again After you drove

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1 from Phoenix to Camp Verde, did you receive another  
2 phone call from the county attorney's office about  
3 appearing for trial?  
4 A I actually called the -- I had gone on  
5 vacation for two weeks, a little under two weeks,  
6 so when I got back from vacation, I called the  
7 county attorney's office to find /TOUT out if I was  
8 going to be needed during that week They said  
9 they would have people testifying during that week  
10 At that point I found out I was not going to be  
11 needed  
12 Q Do you remember what date was you  
13 returned from vacation?  
14 A I returned on the 21st of May So I  
15 would have called the week after that That's a  
16 ^ Sunday ^ sun I would have called some time  
17 after that The next week  
18 Q When you called did you understand  
19 whether or not the state was still in trial?  
20 A I didn't know when I made the phone call,  
21 but I understand that they would be based on the  
22 conversation before I had /STKPWHREFT and what were  
23 you told about coming in to testify in the state  
24 case in chief  
25 A I was told that I was not going to be

03:08:33PM 1 This is a photo of the area where Kirby  
03:08:37PM 2 Brown sat. You remember the testimony of Beverly  
03:08:39PM 3 Bunn, that that is /KEUR business tobacco /PWOUFP  
03:08:43PM 4 that she made. And here's what we know about /KEUR  
03:08:47PM 5 business frame of mind as she entered the sweat  
03:08:51PM 6 lodge. We know that the defendant knew this too  
03:08:53PM 7 because this is the statement that Kirby made on  
03:08:56PM 8 Thursday after she had come off of the Vision Quest  
03:09:00PM 9 during an open mic session. Shortly before  
03:09:03PM 10 entering the defendants heat endurance challenge.  
03:09:12PM 11 (Audio played.)

03:13:10PM 12 MS. POLK: So determined was Kirby Brown to  
03:13:13PM 13 learn what she thought Mr. Ray had to teach that  
03:13:17PM 14 for five hours during that Samurai Game she laid  
03:13:20PM 15 there without moving. Mr. Ray knew that. He knew  
03:13:25PM 16 the influence that he had on Kirby and others,  
03:13:29PM 17 because Kirby and others took the open mic and made  
03:13:33PM 18 statements like that shortly before they all went  
03:13:36PM 19 into his heat endurance challenge. Witness after  
03:13:39PM 20 witness in this trial has testified how they trust  
03:13:43PM 21 identified Mr. Ray's assurance that they would make  
03:13:46PM 22 it through all the rounds and that it was safe to  
03:13:49PM 23 ignore their bodies signs of distress. Dennis  
03:13:52PM 24 Mehravar who passed out again /EPB side around the  
03:13:56PM 25 fifth round. Testified he believed that Mr. Ray



03:23:37PM 1 lodge and kills three people, well that wouldn't be  
03:23:40PM 2 Mr. Ray's fault. And that would be a superseding  
03:23:43PM 3 intervening event. But if you find that some  
03:23:49PM 4 unforeseeable event, like a bold /ER rolling off  
03:23:53PM 5 the cliff, did not cause there are deaths and that  
03:23:56PM 6 but for the the defendants conduct the victims  
03:23:58PM 7 would not have died, and that his conduct in its  
03:24:02PM 8 natural and continue was sequence caused the deaths  
03:24:06PM 9 then you must find Mr. Ray guilty. This issue of  
03:24:12PM 10 super /SRAOEPBG event is where the hours and hours  
03:24:15PM 11 of testimony and cross-examination in this case  
03:24:18PM 12 comes in. The defense wants you to believe that  
03:24:32PM 13 something other than this heat that is right in  
03:24:36PM 14 front of your eyes, something other than this  
03:24:38PM 15 lengthy exposure to /SAERG heat and humidity in a  
03:24:41PM 16 crowded tent caused the deaths of the three  
03:24:44PM 17 victims. Their list of possible causes of death  
03:24:48PM 18 reads a bit like a take out menu from an expensive  
03:24:53PM 19 /TKAOEUPB /ER. It's baloney. It's you will  
03:24:56PM 20 baloney. Organo-phosphates, rat poison, ant poison  
03:25:00PM 21 that Mr. Li bought at Home Depot brought it in this  
03:25:04PM 22 courtroom parade /-D in /TPROPT of all of you.  
03:25:08PM 23 /AOEP though there is no evidence that product was  
03:25:10PM 24 ever out at Angel Valley. We'd killer /-RPLT  
03:25:13PM 25 /STAEUPBT tainted water. Tainted fruit fruit with

03:25:16PM 1 flies. Soil with pesticide, the tarps. The the  
03:25:20PM 2 wood. The wrong wood, the wood with nails, the  
03:25:23PM 3 wood without nails. Treated wood, pressure treated  
03:25:27PM 4 wood. Wood sealer, free will, the victims chose to  
03:25:33PM 5 stay in the tent. And finger pointing. That  
03:25:37PM 6 Rotillo the landscaper on his own and apparently at  
03:25:41PM 7 his own expense purchased some deadly toxin sprayed  
03:25:45PM 8 it at the ^ sight ^ site ^ cite just before the  
03:25:47PM 9 ceremony but didn't get sick himself or that the  
03:25:50PM 10 Mercers built the sweat lodge wrong and the very  
03:25:56PM 11 short lived other cause defense that Mr. Ray tried  
03:26:00PM 12 to pull on sergeant Barbaro that Ted was the one  
03:26:04PM 13 running the sweat lodge. It's ridiculous, the  
03:26:10PM 14 defendant wants you to ignore what is right in  
03:26:12PM 15 front of your eyes. This prolonged exposure to  
03:26:16PM 16 unbearable heat in a /KROU /KROUT /-D tent with  
03:26:20PM 17 /SAERG steam signs of distress all around the  
03:26:22PM 18 defendant. That people were seriously suffering,  
03:26:25PM 19 that he acknowledges in the tent yet continues to  
03:26:28PM 20 administrator rocks, more water, producing more  
03:26:34PM 21 heat and more steam. They want you to ignore  
03:26:38PM 22 problems in past years that Mr. Ray when he  
03:26:41PM 23 conducts his heat event had whether it was in that  
03:26:44PM 24 same structure or in a different structure. No  
03:26:48PM 25 problems in the same structure when someone other

03:28:17PM 1 this case was going to trial organo-phosphates.  
03:28:22PM 2 Something that could incidentally could only be  
03:28:24PM 3 tested for within hours or within the first few  
03:28:27PM 4 days of it's absorption because it dissipates so  
03:28:31PM 5 quickly. So here is where your common sense and  
03:28:34PM 6 experience comes in. You heard Dr. Mosley testify  
03:28:37PM 7 that there are thousands /-Z of organo-phosphates  
03:28:41PM 8 compounds and in this case Dr. Mosley said the only  
03:28:44PM 9 likely ^ ones ^ once would be pesticide and  
03:28:48PM 10 pesticide are probably not a reasonable source of  
03:28:51PM 11 toxicity. The fact of the matter is if we had  
03:28:54PM 12 tested for and eliminated organo-phosphates, they  
03:28:57PM 13 would have come up with some other substance,  
03:28:59PM 14 /PHRAOU tone /KWRUPL perhaps. That we didn't test  
03:29:02PM 15 for. There are two expert witness doctors in this  
03:29:07PM 16 case. Who are you going to believe, Dr. Dickson,  
03:29:10PM 17 the State's expert, or Dr. Paul, the doctor that  
03:29:14PM 18 the defense hired. Dr. Dickson, who works in an  
03:29:18PM 19 emergency room in Yuma, which is both a farming  
03:29:22PM 20 community, where organo-phosphates compounds are  
03:29:25PM 21 used in pesticide /-Z and Yuma, which is just  
03:29:29PM 22 probably about the hottest place in the state of  
03:29:32PM 23 Arizona. Dr. Dickson, who treats about 20 live  
03:29:35PM 24 ^ patience ^ patients every year he said with heat  
03:29:38PM 25 exhaustion or heat stroke, and who also treats live

03:29:42PM 1 ^ patience ^ patients suffering from  
03:29:43PM 2 organo-phosphates poisoning. Who has treated  
03:29:47PM 3 actually some border agents who were directly  
03:29:49PM 4 sprayed by some crop does /TERZ who didn't die, by  
03:29:54PM 5 the way and who treats ^ patience ^ patients with  
03:29:57PM 6 hypercapnia or carbon dioxide poisoning.  
03:30:00PM 7 Dr. Dickson, ^ who is ^ whose the emergency  
03:30:02PM 8 management systems director for Yuma county and who  
03:30:07PM 9 teaches the he am is, the fire fight /ERGS the  
03:30:10PM 10 border control agents and doctors for the military  
03:30:13PM 11 base about heat relate related illness and heat  
03:30:16PM 12 stroke on a regular basis. Or are you going to  
03:30:20PM 13 believe Dr. Paul. The defense doctor out of New  
03:30:25PM 14 Mexico who conveniently says he cannot rule out  
03:30:29PM 15 organo-phosphates because the signs and symptoms  
03:30:30PM 16 are could not /SES. Consistent and unfortunately  
03:30:34PM 17 no testing was done. Dr. Paul, who has never  
03:30:38PM 18 treated a live patient with organo-phosphates  
03:30:41PM 19 poisoning, who has never performed an autopsy on a  
03:30:44PM 20 patient with organo-phosphates poisoning, ^ who  
03:30:48PM 21 is ^ whose colleagues have never performed an  
03:30:49PM 22 autopsy on a patient with organo-phosphates  
03:30:53PM 23 poisoning and who has done only 10 to 12 autopsies  
03:30:56PM 24 on ^ patience ^ patients with heat stroke.  
03:31:00PM 25 Dr. Paul, who was asked point blank by Mr. Hughes,

03:31:04PM 1 what is the lethal dose of an organo-phosphates  
03:31:10PM 2 that would be needed in this case. What is the  
03:31:13PM 3 lethal dose of an organo-phosphates. What would it  
03:31:18PM 4 be. Do you remember Dr. Paul's answer? He has not  
03:31:22PM 5 done any research in that area and that would be  
03:31:26PM 6 beyond his area of expertise. Well he apparently  
03:31:29PM 7 just stopped /HUS research without testing were  
03:31:33PM 8 this conclusion or organo-phosphates is even  
03:31:36PM 9 plausible. Dr. Paul, who admits he is not aware of  
03:31:40PM 10 any case where sitting on a pesticide with an  
03:31:44PM 11 organo-phosphates compound caused death, but again,  
03:31:48PM 12 conveniently told you that's outside of his area of  
03:31:53PM 13 /PEBGS expertise. Dr. Paul, who has no explanation  
03:31:59PM 14 by the way, why some people face down got sick and  
03:32:02PM 15 others did not. Why some people face up got sick  
03:32:06PM 16 and others do not. The theory that Dr. Paul is  
03:32:15PM 17 suggesting to you, is that some how somebody came  
03:32:18PM 18 in sprayed /PAO\*ES pesticide in that /SOEUPL, the  
03:32:26PM 19 came in. Directly /AB /SORP it those lying down  
03:32:29PM 20 apparently right in a patch some how got sick. The  
03:32:32PM 21 /PWROB that /THAOER /SEU that there is no pattern  
03:32:34PM 22 of who got sick and who did not. In other words,  
03:32:39PM 23 you have Mark Rock base face down with his face in  
03:32:43PM 24 that soil and he did not get sick. You have Dawn  
03:32:47PM 25 Gordon right beside him face up and she does not

03:32:51PM 1 get sick. Kirby Brown, ^ who is ^ whose face up.  
03:32:56PM 2 Face up until they push her to her side. Who gets  
03:33:01PM 3 sick. And James Shore, right next to her, the  
03:33:04PM 4 testimony was that he was close to the pit in the  
03:33:08PM 5 beginning face down but then moved back and then  
03:33:11PM 6 from that point forward he was either on his side  
03:33:16PM 7 or he was up tending helping others. You have Liz  
03:33:22PM 8 Neuman ^ over here ^ overhear the testimony was  
03:33:24PM 9 that she leaned back on the legs of Laura Tucker  
03:33:29PM 10 Jenny. Who crossed their knees and Liz Neuman  
03:33:33PM 11 leaned back on them. We have Sidney Spencer who  
03:33:40PM 12 was right there. The testimony was from Dawn  
03:33:45PM 13 Gordon that she noticed that when /S\*UD was being  
03:33:48PM 14 pulled out that her chin was on her chest passed  
03:33:51PM 15 out. Stephen Ray, down here, his testimony was  
03:33:56PM 16 that he was covering his mouth and his nose with  
03:33:59PM 17 his hand and then later with his shirt. Beverly  
03:34:04PM 18 Bunn, who was on the back knees in the air from the  
03:34:09PM 19 second round on, not sick. Sean Ronan, he's the  
03:34:15PM 20 third person who was pulled out when the ceremony  
03:34:18PM 21 was over and air he /SRABGD up to Flagstaff. Sean  
03:34:22PM 22 told you he was sitting and then he was laying on  
03:34:24PM 23 his back until the fifth round and then he moved to  
03:34:26PM 24 his stomach. And Linda Andresano who passed out  
03:34:30PM 25 inside again the nurse from Tucson passed out

03:52:13PM 1 again. And listen to what he says, we don't really  
03:52:16PM 2 know maybe carbon monoxide with some maybe  
03:52:20PM 3 organo-phosphates mixed in. But listen to it.  
03:52:25PM 4 (Audio played.) Can.

03:53:18PM 5 MS. POLK: That's the evidence that the /KE  
03:53:22PM 6 fence has built this house of cards around wanting  
03:53:25PM 7 you to believe that some how organo-phosphates  
03:53:27PM 8 killed the three victims. There has been no  
03:53:29PM 9 evidence whatsoever of the use of any product at  
03:53:33PM 10 Angel Valley with organo-phosphates in it. And the  
03:53:35PM 11 state has proven beyond a reasonable doubt that the  
03:53:38PM 12 Hamiltons used in fact very few chemicals on their  
03:53:42PM 13 property and used no chemicals containing  
03:53:46PM 14 organo-phosphates there is simply no evidence of  
03:53:47PM 15 any unknown toxin on that property at all. No  
03:53:52PM 16 pressure treated wood, no pesticide no mysterious  
03:53:55PM 17 rat poison and no organo-phosphates that killed the  
03:53:57PM 18 three victims. Use your common sense again, I  
03:54:02PM 19 don't know about you, but when I smell pesticide, I  
03:54:05PM 20 smell them. The evidence in this case has been  
03:54:09PM 21 from witness after witness that nobody smelled  
03:54:12PM 22 anything unusual in that sweat lodge. Debby Mercer  
03:54:16PM 23 said she never smelled any oh /TORZ on the  
03:54:19PM 24 conversation when she helped build the sweat lodge  
03:54:21PM 25 and she never saw any evidence of use of pesticide

04:19:58PM 1 The last issue is I think, there is a 404(b)  
04:20:05PM 2 violation in that Ms. Polk argued that the  
04:20:09PM 3 2007, 2008 events were proof that Mr. Ray's conduct  
04:20:14PM 4 caused the deaths and this is again, the whole  
04:20:19PM 5 pattern arguments Your Honor. So we just want to  
04:20:23PM 6 note that for the record. I don't want to  
04:20:25PM 7 interrupt Ms. Polk. I want to respect her  
04:20:28PM 8 abilities to make the argument but we have to make  
04:20:30PM 9 this record and if this is might be the best way to  
04:20:34PM 10 do it and this is how we'd like to do it unless the  
04:20:37PM 11 court is going to admonish the prosecution.

04:20:40PM 12 THE COURT: There is actually one other thing  
04:20:42PM 13 that I was concerned with Ms. Polk Mr. Li and I  
04:20:45PM 14 believe that the audio played from Kirby Brown was  
04:20:51PM 15 argued for purpose that was not permitted that was  
04:20:54PM 16 contrary to the special instruction. I noted that  
04:20:56PM 17 as well along with these others. I was making  
04:20:59PM 18 notes as I went through. Ms. Polk.

04:21:02PM 19 MR. LI: Your Honor, there is -- well.

04:21:05PM 20 THE COURT: Well I want Ms. Polk to be able to  
04:21:07PM 21 address anything that you believe.

04:21:09PM 22 MR. LI: Well I'm going to add one more.  
04:21:11PM 23 Which is there is a continual refrain the defendant  
04:21:15PM 24 wants you to believe X. We are walking right up to  
04:21:20PM 25 what in California is called Griffen era. I'm not



04:22:56PM 1 purposes. I noted that concern as well.

04:23:02PM 2 MS. POLK: What I'd like to do is pull up that  
04:23:04PM 3 limiting instruction. My recollection was that it  
04:23:06PM 4 was introduced for that purpose to understand /KEUR  
04:23:10PM 5 business state of mind as she /TERPBD the sweat  
04:23:13PM 6 lodge /STKPHR-FPLT I thought I hear also indicating  
04:23:16PM 7 that the facts remembered exactly how many hours  
04:23:19PM 8 were spent and the suffering and that, which is  
04:23:22PM 9 against eight oh three.

04:23:24PM 10 MS. POLK: Excuse me for interrupting there  
04:23:26PM 11 was testimony from other witnesses that Kirby lay  
04:23:29PM 12 there from five hours. That didn't come from the  
04:23:31PM 13 tape. I argued the tape for that purpose that was  
04:23:34PM 14 her state of mind there is other /WETS who  
04:23:37PM 15 testified Jennifer heal and others who testified  
04:23:40PM 16 how long it was that Kirby laid there.

04:23:42PM 17 THE COURT: I remember the bench conference  
04:23:44PM 18 with Jennifer Haley there was 10 den I to bring in  
04:23:49PM 19 hear /SAEUFPLT the only type I sense impression  
04:23:52PM 20 feeling a sense of accomplish /-PLTD that was /-TD  
04:23:55PM 21 only thing that was supposed to come in on that.  
04:23:58PM 22 Because once again, it was going to be another form  
04:24:01PM 23 of hearsay statement. ^ Anyway ^ Any way. I think  
04:24:06PM 24 there are grounds for these and direct that you  
04:24:14PM 25 acknowledge them and you have.

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                           FOR THE COUNTY OF YAVAPAI

3  
4       STATE OF ARIZONA,       )  
5               Plaintiff,       )  
6               vs.               ) Case No. V1300CR201080049  
7       JAMES ARTHUR RAY,       )  
8               Defendant.       )  
9       \_\_\_\_\_

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11  
12  
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14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15       BEFORE THE HONORABLE WARREN R. DARROW  
16               TRIAL DAY FIFTY-SEVEN  
17                       JUNE 16, 2011  
18               Camp Verde, Arizona

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21  
22  
23  
24                               REPORTED BY  
25                               MINA G. HUNT  
                              AZ CR NO. 50619  
                              CA CSR NO. 8335

09:48:48AM 1 evidence. And that's what I've done.

09:48:49AM 2 THE COURT: The explanation cannot imply or  
09:48:52AM 3 suggest that it's because the defense didn't do  
09:48:55AM 4 their job and tell us what could have been a  
09:48:57AM 5 problem because they really knew it -- they knew it  
09:48:59AM 6 wasn't really a problem, so that's why they didn't  
09:49:01AM 7 do it and they should have told us.

09:49:04AM 8 MS. POLK: I never once said the defense had  
09:49:06AM 9 to tell us, Your Honor. But what the jury knows is  
09:49:08AM 10 that the state did not know it, and that's what I  
09:49:10AM 11 have reminded them is that we did not know it.

09:49:12AM 12 I never once said the defense had an  
09:49:15AM 13 obligation to produce any evidence. I never once  
09:49:17AM 14 said the defense had any obligation to tell the  
09:49:19AM 15 state what their theory was. But the jury knows  
09:49:22AM 16 and the testimony was that we did not learn about  
09:49:24AM 17 it until shortly before trial. And that's what  
09:49:27AM 18 I've argued to the jury.

09:49:29AM 19 THE COURT: Yes. And I think that the case  
09:49:31AM 20 has been framed with a Brady issue. I look at that  
09:49:34AM 21 and the other things that have occurred, the  
09:49:37AM 22 initial problem in getting information that was  
09:49:41AM 23 provided to the medical examiners. I think all of  
09:49:43AM 24 that tends to color how the case has proceeded.

09:49:49AM 25 The first part -- the first part of this

10:49:00AM 1 others to deal with the aftermath and eventually  
10:49:04AM 2 telling Debbie Mercer that she could open the back  
10:49:08AM 3 of the tent but only if it was -- if she absolutely  
10:49:11AM 4 had to?

10:49:12AM 5 This is Mr. Ray, who during the ceremony  
10:49:15AM 6 told somebody to urinate in that tent. And now  
10:49:19AM 7 that it's over, now that he has information from  
10:49:23AM 8 Debbie Mercer that three people are still down, he,  
10:49:29AM 9 first of all, doesn't get up and go help open the  
10:49:33AM 10 back of the tent to get them out, but, secondly,  
10:49:35AM 11 tells Debby she can only open the back of the tent  
10:49:39AM 12 if it's absolutely necessary.

10:49:40AM 13 If Mr. Ray had paid attention to the  
10:49:44AM 14 calls for help for Kirby when they were first made  
10:49:47AM 15 before the beginning of the seventh round, would  
10:49:50AM 16 Kirby Brown still be alive? And if Mr. Ray had  
10:49:54AM 17 done something to get Kirby out when it was over,  
10:49:56AM 18 had an AED onsite and worked on her faster, would  
10:50:01AM 19 Kirby still be alive?

10:50:09AM 20 Nell Wagoner, again, the doctor from  
10:50:13AM 21 Juneau, Alaska, testified that she stayed in the  
10:50:16AM 22 sweat lodge the whole time at the 5:00 o'clock  
10:50:18AM 23 position very close to Mr. Ray. Dr. Wagoner told  
10:50:21AM 24 you how she lost track of time, but she was aware  
10:50:24AM 25 that people were being dragged out and that others

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                           FOR THE COUNTY OF YAVAPAI

3  
4       STATE OF ARIZONA,       )  
5               Plaintiff,       )  
6               vs.               ) Case No. V1300CR201080049  
7       JAMES ARTHUR RAY,       )  
8               Defendant.       )  
9       \_\_\_\_\_ )

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11  
12  
13  
14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15       BEFORE THE HONORABLE WARREN R. DARROW  
16               TRIAL DAY FIFTY-NINE  
17               JUNE 21, 2011  
18               Camp Verde, Arizona

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22  
23  
24                               REPORTED BY  
25                               MINA G. HUNT  
                              AZ CR NO. 50619  
                              CA CSR NO. 8335

11:26:57AM 1 Many witnesses have testified in this  
11:27:01AM 2 court about the extreme nature of Mr. Ray's sweat  
11:27:07AM 3 lodge ceremony. It is the ultimate heat challenge.  
11:27:12AM 4 This abomination of a sweat lodge ceremony, extreme  
11:27:15AM 5 nature of Mr. Ray's conduct, the extreme heat and  
11:27:18AM 6 the extreme humidity that caused people to get sick  
11:27:22AM 7 and finally caused the deaths of three people, and  
11:27:26AM 8 not some random patches of the pesticides.

11:27:33AM 9 There has been several, I'll call them,  
11:27:37AM 10 "attacks" on the state. And I'm going to address  
11:27:39AM 11 just a few of them.

11:27:41AM 12 First, I never thought I would find  
11:27:44AM 13 myself having to defend the fact that I'm a working  
11:27:47AM 14 county attorney. So I'm just going to leave that  
11:27:50AM 15 one alone.

11:27:52AM 16 Second, I want to talk about this meeting  
11:27:55AM 17 in December of 2009 at the county attorney's office  
11:27:59AM 18 with the medical examiners. Mr. Li made several  
11:28:03AM 19 references to this so called secret meeting. What  
11:28:06AM 20 you learned at trial is that there was a charging  
11:28:09AM 21 meeting at the county attorney's office and that  
11:28:11AM 22 such meetings are not unusual as the prosecutors  
11:28:15AM 23 and the detectives review cases. Our belief that  
11:28:19AM 24 the defense attorneys were not entitled to the  
11:28:21AM 25 details --

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                       FOR THE COUNTY OF YAVAPAI

3  
4       STATE OF ARIZONA,       )  
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6               vs.               ) Case No. V1300CR201080049  
7       JAMES ARTHUR RAY,       )  
8               Defendant.       )  
9       \_\_\_\_\_ )

10  
11  
12  
13  
14               REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15               BEFORE THE HONORABLE WARREN R. DARROW  
16               AGGRAVATION TRIAL DAY TWO

17                       JUNE 29, 2011

18                       Camp Verde, Arizona  
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24                               REPORTED BY  
25                               MINA G. HUNT  
                              AZ CR NO. 50619  
                              CA CSR NO. 8335

09:40:14AM 1 THE COURT: Ms. Polk, I'm going to ask that  
09:40:16AM 2 you stop the audio.  
09:40:22AM 3 Mr. Kelly, Ms. Polk, approach.  
09:40:31AM 4 (Sidebar conference.)  
09:40:31AM 5 MR. KELLY: This is not in evidence.  
09:40:34AM 6 MS. POLK: This is in evidence.  
09:40:38AM 7 THE COURT: It is or it isn't?  
09:40:38AM 8 MS. POLK: It is, Your Honor. I checked the  
09:40:40AM 9 exhibit list. It's in evidence. And have you  
09:40:42AM 10 looked at your exhibit list?  
09:40:45AM 11 MR. KELLY: If it is, it's a mistake. It's  
09:40:48AM 12 never been played in front of this jury. I've  
09:40:52AM 13 never heard it. I'd move for a mistrial.  
09:40:57AM 14 THE COURT: I don't recall hearing that.  
09:40:54AM 15 MS. POLK: Your Honor, it was played in my  
09:40:54AM 16 opening. And then I moved to admit all those  
09:40:54AM 17 audios, and it was admitted at the beginning of  
09:40:59AM 18 trial.  
09:40:59AM 19 MR. KELLY: We need to take a break, Judge.  
09:41:02AM 20 This is a serious problem.  
09:41:03AM 21 MS. POLK: This is evidence that was admitted  
09:41:05AM 22 at trial.  
09:41:07AM 23 THE COURT: If it's admitted at trial, then  
09:41:09AM 24 it's admitted. If it's not admitted, then it's  
09:41:13AM 25 right into a mistrial.





## CERTIFICATION OF AUTHENTICITY

To: Bill Hughes, Deputy County Attorney  
Yavapai County Attorney's Office  
255 East Gurley Street  
Prescott, AZ 86301

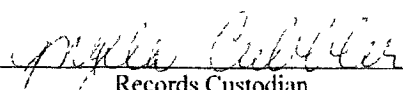
Ph. 928-771-3344

Re: LITIGATION SUPPORT PACKAGE  
NMS Labs Expert Services No. 11-0115  
NMS Labs Workorder No. 11034535  
Patient ID: James Shore


I certify that the documents (37 pages) contained in this litigation support package are true and accurate reproductions of the reported data generated in the normal course of business by employees of NMS Labs, and maintained in the files of this laboratory.

A complete, identical set of the attached records is maintained at NMS Labs.

**Note:** Edited/redacted information (numbers & names) in the documentation is pertaining to other patient samples in the same instrument run. It is not pertaining to this case and intended to protect health information of patients not related or relevant to this case.

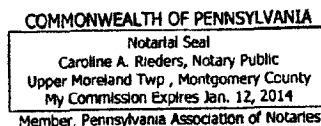
  
\_\_\_\_\_  
Records Custodian

4/27/11  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Pennsylvania Notary

4/27/11  
\_\_\_\_\_  
Date

Seal:





3701 Welsh Road  
Willow Grove PA, 19090

## Phone Log History Report

Workorder	Work ID	Chain	Profile	Profile Name
11034535	40209509	11269463	60231FR	AIT Laboratories, Inc., Indianapolis
Call Date	Call Number	Reason	User	Notes
2/22/2011 4 38 08 PM	26316316	WONOTE	JMK	Case folder pulled per request for AMC
2/23/2011 10 05 00 AM	26322451	WONOTE	AMC	I received a call from Kathy Durrer at the Yavapai County Prosecutor's Office to inquire about having the person who performed the testing testify at trial the first week in April, 2011. I explained the process to Kathy and recommended flying a toxicologist there to testify if the defense approves since they can explain the entire process rather than flying everyone there who touched the sample. This decedent is one of 3 people who died in a sweat lodge ritual in October, 2009. The defense expert stated in his report that the cause of death is poisoning. Because NMS' testing was negative they feel this is an important piece of evidence to rebut the defense expert's opinion. I discussed the case with Dr. Blum and he feels this testing alone is not enough to rebut the defense expert's opinion and would like to speak with the Prosecuting Attorney, Bill Hughes whose name was given to me by Kathy. I also spoke to Mr. Hughes and he said he has to be in court before 8 AM which is 10 AM OT and if Dr. Blum could call him before he goes to court that would work for him. He asked me to email Kathy to let him know when to expect Dr. Blum's call. I emailed Kathy that Dr. Blum would call Mr. Hughes on Friday morning between 7 and 7:30 their time and asked if that was acceptable. Case folder and analytical data forwarded to Dr. Blum to review.
2/25/2011 9 21 02 AM	26350698	WONOTE	LMB	I spoke with Mr. Hughes today regarding the results of the OP pesticide testing performed. I cautioned him about the limitations of the test results, especially my concerns about the stability of OPs in blood specimens in light of the time interval between the time of death and the testing of the specimens. Returned the case folder to expert services.
2/28/2011 12 52 10 PM	26378176	WONOTE	LMB	I spoke with Cynthia Ross (928-771-3153) at the medical examiner's office about testing for OP pesticides in frozen tissue (brain and liver) in this case. I expressed the same concern about stability to her as I did to Mr. Bill Hughes. She said that the issues may still yet come through AIT labs for testing. Returned case folder to expert services.
2/28/2011 1 20 49 PM	26378574	WONOTE	AMC	Case folder in the bin on my desk to await tissue samples.
4/6/2011 12 42 29 PM	26824878	WONOTE	CXR	Received subpoena and rush request for this lit pack from Bill Hughes @ Yavapai Co DA's office. Requesting data to ESG-- have FF.

Specimen Processing Notes			
Lab Sample ID	Receive Date	Clarify / TIQ Reason	Clarify Note